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Military Culture, War Crimes and the Defence of Superior Orders

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MILITARY CULTURE, WAR CRIMES AND THE DEFENCE OF SUPERIOR ORDERS

By

AZIZ MOHAMMED

A Thesis submitted to BOND UNIVERSITY in partial fulfilment of the requirement for the Degree of Doctor of Legal Science.

AUGUST 2008

Gold Coast
AUSTRALIA

CERTIFICATE

This Thesis is submitted to BOND UNIVERSITY in partial fulfilment of the requirement for the Degree of Doctor of Legal Science.

This Thesis presents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

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Aziz MOHAMMED Date: 30 August 2008

PREFACE

All military forces function according to the principles of discipline and obedience to orders. Soldiers are an effective instrument in the hands of military commanders, who are prepared to serve the interests of their nations regardless of the adversities. The saying: 'Ours is not to reason why, ours is to do or die' ever lingers in the memories of soldiers as they undertake missions. With the growing number of soldiers charged and convicted for atrocities, there is growing concern especially when pleas are made regarding the defence of superior orders. In this thesis, I have tried to examine this concern, both in my capacity as a professional military officer as well as an academic.

In researching and writing this thesis, I have gained invaluable knowledge and understanding on matters like soldiering and the existing laws relating to warfare. All this has benefited me in my understanding and the application of the same in my defence forces.

In undertaking the research and writing of this thesis, I am indebted to so many people for their generous assistance and advice. I am grateful to Professor Doctor Bee Chen Goh and the staff of BOND University Law Faculty for their continued encouragement, assistance and guidance. My appreciation also extends to Commodore Josaia Vorege Bainimarama, the Prime Minister of Fiji and the Commander of the Republic of Fiji Military Forces and Brigadier Ioane Naivalurua, the Commissioner of Prisons for their professional advice and comments regarding this thesis. My heartfelt appreciation to my wife, Dr Lubna Rizvia Mohammed for her continued assistance and support. Finally, I dedicate this thesis to my late dad, Pir Mohammed and late brother, Aslam Mohammed, who were the pillars of strength and encouragement in my endeavours.

Aziz MOHAMMED

August 2008

SUMMARY

Throughout recorded history, we seem to have been plagued with more wars than peace. Everyday more atrocities and gross crimes against humanity are committed. The reality of war has become a constant element in human and national affairs involving great suffering, destruction, and often catastrophic ravaging of entire societies. To mitigate this savagery, reciprocal restraints on the conduct of war and armed conflict became advantageous and common, as means and methods of warfare became more destructive and sophisticated.

'I was only following orders'. This has become a common plea mouthed by the relative innocent junior soldiers and the dubious battlefield murderers. Is there a defence of obedience to superior orders? If so, to what extent can a soldier plead to such a defence?

Obedience to orders has taken such an important role in conflicts that soldiers are now left to argue and ponder when not to comply with an order. What is wrong? Why is this happening? Are the current laws inadequate and unclear? Are the current military doctrines and manuals inadequate and of no significant help? Is the defence, obedience to superior orders, raised as merely a smoke screen to camouflage the atrocities and shift blame to avoid punishment? The military culture behind the obedience to orders, its standards and how they can be improved to resolve the impasse of atrocities being committed under the common plea of obedience to superior orders.

This thesis seeks to examine the military culture of obedience and the standards that exist relating to the defence of superior orders. It will explore laws and practices for this defence that have been adopted nationally and internationally. It will also propose guidelines for differentiating legal from illegal orders.

Finally, this thesis will reference a case study, which should provide a basis for testing the standards advocated. The case study should also serve as a lesson for our soldiers regarding their conduct on the battlefield, especially acts committed whilst obeying superior orders.

It is hoped that this thesis will provide some answers to the questions relating to the defence of superior orders and in turn help minimise innocent casualties.

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CHAPTER 1

INTRODUCTION

Francisco De Y Lucientes Goya, "*Disasters of War*", (1967) Dover Publications Inc., New York, 1.

"Warfare is a social practice the very nature of which places its practitioners momentarily beyond good and evil, making them partially exempt from normative regulation that exists in all other contexts. War, especially a just war, morally authorises people to engage in acts that would obviously be criminal under any other circumstances. The normal moral intuitions of peacetime about right and wrong offer little purchase on practical deliberation in combat. The law would be wrong to conclusively presume to the contrary."[1]

[1] Mark J Osiel, "*Obeying Orders: Atrocity, Military Discipline & Law of War*", (1999) Transaction Publishers, New Brunswick, 114.

1.0. Armed conflicts and the law.

In modern times armed conflicts have become more complex in nature. The conduct of warfare has become blurred; long gone are the wars previously known where battle used to rage between opposing forces, with very limited involvement of civilians. Modern armies have grown in number and technology; divisions after divisions are being poured onto a battlefield and activities are not confined to the ground, but air and sea as well. In all these developments, the states have increased their fighting equipment and logistics to a degree far beyond a normal capacity and ability ever before experienced. More ships are built with capabilities to travel greater distance and carry more necessities. So much so that giant aircraft carriers glide the oceans, carrying the pride and hope of their nations. More fighter aircraft are produced, with designs improving everyday. No longer restricted to the common plane with limited ability; new aircraft are designed to carry people and ammunition in situations never previously experienced. Furthermore, their ability to provide fire support to ground troops is overwhelming.[2]

With the growing demand due to modern armed conflicts, the main forces of the armies have grown. Servicemen are enlisted into the ranks, either serving as regular, territorial, reserve or auxiliary members. There is willingness amongst soldiers of the territorial, reserve and auxiliary units to assume regular duties when called upon; most leaving their work, business or normal life style. The provision for soldiers today has advanced in technology. More sophisticated and reliable weapons are provided. They are equipped with better outfits for endurance and survival. From the time where a single pellet was

[2] Martin van Creveld, "*Technology and War: From 2000BC to the Present*", (1991) The Free Press, New York, 9 - 297.

being loaded into a rifle, technology has advanced into providing assault rifles with self loading capabilities of up to thirty rounds of ammunition. Where machine guns were loaded with belts of ammunition, drum fed magazines are now used. Where hand grenades were tossed a few meters, they are now propelled from a launcher attached to a rifle with better precision and distance.[3] Where soldiers had to run through open grounds for miles, they are now being carried in armoured personnel carriers to the battle front, minimising exposure and the likelihood of them being shot. These are a few developments experienced by armed forces when preparing for or when being engaged in battle.

As developments are made in the operational, administration and logistical capability of armed forces, there has been a growing need to revise and implement the laws of war. The urge to out manoeuver or gain an upper hand on the enemy is so overwhelming that armed forces resort to any tactics that give them the edge over the other. Modification of ammunition, disguising soldiers as care providers, locating armed personnel in protected building, poisoning water sources, taking civilians as hostage to gain submission by the adversaries, and blowing up dams or dykes to cause destruction and chaos, are some of the many acts members of an armed force may adopt to eliminate their enemy. The fear of abuse is ever lingering in our minds that armed forces may resort to catastrophic acts especially with advanced and destructive ammunition. The world has seen the development of scud missiles which not only deliver conventional munition rounds but are now fitted with chemical and biological agents for wider destruction. Surface to air missiles and vice versa are employed on designated targets with precision accuracy.

[3] Ibid at 81 – 137.

Nuclear bombs are released, not on soldiers, but in a designated area causing wide spread death and destruction. It is due to these developments, that have the potential for cruel and wide spread destruction, that, the need arises to put in place laws to restrict and control their employment.[4]

In time, laws have been implemented to address the developing concerns related to warfare. As the concerns grew, so did the laws. Conditions were put in place regarding different aspects of warfare including laws relating to general conduct in a battle field and to the wounded and sick, shipwrecked personnel at sea, laws relating to the treatment of prisoners of war, laws relating to the protection of civilian persons in time of war, and the use of land mines. In many instances, most of the laws that existed were regulated through domestic legislation and members made accountable for their acts depending on the provisions relating to such laws that existed within. For many states, the laws existed, but the implementation, structure and prosecution was left in a vacuum. Very few service personnel were ever charged and punished for breaches of the law of war, and those that were charged concerned grave breaches which went far beyond the scope of the military operations.[5] Coupled with this is also the problem where political interferences which exist and at times fetter prosecution has also resulted in service personnel not charged or punished for crimes.

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4 Leslie C Green, "*The contemporary law of armed conflict*" (1993) Manchester University Press, Manchester and New York, 118 – 233.

5 Gabriel Kolko, "On the Avoidance of Reality", in Richard A Falk, Gabriel Kolko and Robert Jay Lifton, "*Crimes of War: A Legal, Political – Documentary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and soldiers for criminal Acts in Wars*", (1971) Random House, New York, 11.

For the international community, the establishment of the International Criminal Court has brought about many changes in the way the laws of war were advocated, practiced and enforced amongst states. There is a sudden surge amongst states to take the International Criminal Court seriously and many have been forced into implementing domestic legislation to ensure that their nationals are not caught in the web of the International Criminal Court. With the new evolving laws and structure; states, statesmen, nationals and service members are all held accountable in an armed conflict.[6] Their acts and conduct are now scrutinized, ensuring accountability for their actions. This issue is important because it involves servicepersons, their conduct in military operations and accountability for their actions in such operations. No longer are officers and soldiers restricted to the scrutiny of their own legal system; accountability now extends to a broader international level. The standards required of states, leaders and members of the armed forces are no longer restricted to domestic standards, rather to those carried by the international community.[7]

2.0. Obedience to superior orders and its defence.

In armed conflicts, too often there are gross violations of international humanitarian law, and atrocities are committed against civilians and members of the armed forces alike. On a large scale, ethnic cleansing, religious prosecution, and displacement of large communities of people have taken place. Statistics show that some 76 million people lost

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6 Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court verses Customary International Law", (1999) 10 *European Journal of International Law*, 172

7 Theodor Meron, "*War Crimes Law Comes of Age*", (1998) Clarendon Press, Oxford, 296 – 305.

their lives as a result of armed conflicts from 1945 up to 1987 alone.[8] To illustrate some of these losses, for example, as early as 1900 to 1923, the Turkish, in the first known ethnic cleansing, exterminated some 2 million Armenians, Greeks, Nestorians and Christians.[9] Similarly, millions of Germans were killed by the Polish during the German retreat in October of 1944.[10] Also, in East Pakistan (now Bangladesh), the Pakistani regime under General Agha Mohammed Yahya Khan in 1971 killed 1.5 million Bangali people, creating 10 million refugees who fled to India.[11] The Japanese were alleged to have murdered some 3 million to 10 million prisoners of war from 1937 to the end of Second World War. During the Second World War, some 6 million Jews were exterminated by the Third Reich;[12] and during 1975 and 1979, approximately 1.7 million Cambodians were killed by Pol Pot and his Khmer Rouge soldiers.[13] In more recent years, thousands of people have been killed in Bosnia,[14] Rwanda,[15] Former Yugoslavia [16]and many other countries: even to date, there are on going efforts to identify and correct records for all the deaths that may have occurred.

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8 Joseph Rudolph Rummel, "*Democide (Genocide and Mass Murder*) since 1945", in http://www.mega.nu:8080/ampp/rummel/postwwii.htm., 56.

9 Peter Balakian, "*The Burning Tigris: The Armenian Genocide and America's Response*", (2004) HarperCollins Publishers, New York, 11.

10 Ibid to footnote 8.

11 Anthony Mascarenhas, "*The Rape of Bangla Desh*", (1972) Vikas Publications, Delhi, 116-17.

12 Saul Friedlander, "*Memory, History, and the Extermination of the Jews of Europe*", (1993) Indiana University Press, Bloomington, 1.

13 Yale University, "*Cambodian Genocide Program*", (2004) New Haven, Connecticut, in http://www.yale.edu/cgp/, 1.

14 Michael Sells, "*The Bridge Betrayed: Religion and Genocide in Bosnia*", (1996) University of California Press, Berkley, California, 1.

15 Jean Hatzfeld, trans Linda Coverdale, "*Machete Season: The Killers in Rwanda Speak*", (2005) Farrar Straus & Giroux, New York, 1.

16 Nicholas Mills & Kira Brunner, "*The New Killing Fields: Massacre and the Politics of Intervention*", (2002) Basic Books, New York, 34.

One of the most distinctive features about this unimaginable loss of lives is that most deaths have occurred as a result of atrocities committed under the disguise of obedience to superior orders. People have been massacred by military commanders and soldiers, who pleaded later that their act was in compliance with a superior order. As Solis writes, "I was just following orders... has been used so often, in so many circumstances, that today, it is its own parody."[17] This phrase not only gives rise to concerns legally, morally and socially as to conduct whilst engaged in armed conflicts; more importantly, it questions whether such conduct is always legitimate. There are serious legal questions that arise from soldier obedience to superior orders. Does a soldier's obedience to superior orders afford a legitimate defence to any criminal liability? Is this defence legitimate for all orders issued by military commanders? Are there standards which exist that would enable a soldier to differentiate a legal from an illicit order?

Undoubtedly, the military is a profession where obedience has been classed as a "cardinal virtue"[18] and rightly, is seen as the backbone of any armed forces.[19] This virtue is so pronounced that a good soldier is characterised by his obedience and discipline. As Larocca writes: "The American idea of a good soldier, created by the military and fully

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17 Gary A Solis, "*Obedience of Orders and the Law of War: Judicial Application in American Forums*", (2000) 15 American University International Law Review, Washington, 481.

18 Walter Gorlitz, "*The Memoirs of Field Marshal Keitel*", (1965) Cooper Square Press, New York, 91.

19 Douglas Bland, "*Backbone of the Army: Non-Commissioned Officers in the Future Army*", (2000) McGill- Queen's University Press, Montreal & Kingston, 15.

absorbed by most civilians, is a wholly obedient soldier."[20] These thoughts hold true for all military commanders and the armed forces. They would prefer to have soldiers who simply follow directives and do all they can to defeat the enemy. They are not concerned about the morality of the conflict, simply seeing themselves as soldiers under a directive to accomplish a mission under any circumstances. Nothing can be better for a commander than to see soldiers who are not concerned with ethics and moral issues, or the legality of the orders, but who perform and accomplish task as directed.

The more conflicts that are experienced, the more occasions where the defence of obedience to superior orders has been pleaded by soldiers in defence of criminal acts and atrocities. Many scholars have argued that to a certain extent, there exists a legal defence to criminal acts or atrocities when committed in obedience to a superior.[21] Soldiers have also believed that they are immune from criminal responsibility when they act in obedience to orders from a higher authority. To date, however, no soldier or person charged for atrocities or criminal offences relating to obedience to superior orders has been successful in using obedience to superior orders as the only defence; rather more success has been gained by advancing a defence of duress.[22]

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20 Liz Larocca, "The Good Soldier: John Kerry, the good soldier, continues his fight for morality in the military", (2005), Common Dreams News Centre, in http://www.commondreams.org/views05/0213-10.htm, 1.

21 Mark J Osiel, "*Obeying Orders: Atrocity, Military Discipline & Law of War*", (1999) Transaction Publishers, New Brunswick, 26.

22 Matthew Lippman, "*Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*", (1996) 15 Dickson Journal of International Law, Carlisle, Pennsylvania, 20.

Despite soldiers finding no relief in arguing the obedience to superior orders as a defence, why is it that so many service personnel and civilians continue to plead and argue such a defence? Is there really a defence to criminal acts and atrocities arising from obedience to superior orders? If there is such a defence, under what circumstances can it be invoked? Is it conditional and subject to any existing standards? Does this defence (if in existence), have similar applications both in national and international settings? Soldiers are a fighting machine, carrying on their shoulders the responsibility of defending not only their country, but in modern conflict, the international community at large. Despite the adversities, soldiers try to function and achieve the desired goals of their military commanders. We must not only identify what the current positions are regarding the defence to superior orders but also, importantly, soldiers must be made aware of the limitations that exist, especially concerning legal and illegal orders.

3.0. Scope and Outline.

Interest in researching the defence of superior orders started from my early days in the military, especially after being confronted with situations where the issue relating to obedience to superior orders and its defence became a critical factor in the performance of military duties. I witnessed the confusion faced by military commanders and soldiers first hand in trying to differentiate and resolve impasses relating to orders, especially when there were grave concerns about the illegality of the same. The desire to research in this area was finalised after I assumed the role of lead prosecutor in the military in Fiji. Preparing to prosecute some one hundred fifty one officers and soldiers charged for mutiny, incitement to mutiny and treason related charges arising from the *coup d'etat* in

Fiji in 2000; the mutiny at the Sukainivalu Barracks, Labasa; and the mutiny at the Queen Elizabeth Barracks, Nabua; it was of great concern to see these service personnel arguing obedience to superior orders as a defence. What was of greater concern was that the majority of these service persons were from the elite forces unit of the Republic of Fiji Military Forces, a force not only highly trained but educated in all aspects of military professionalism.

Thinking more about the cases and the defence argued by the officers and soldiers, it occurred to me that there was much confusion when addressing the question about obedience to superior orders and its legalities. If this position existed in one particular unit, then there was a possibility of it being present amongst other units. This was proven correct after questioning other soldiers about orders, especially relating to identifying and following illegal orders. As armies prepare to participate in more and more international peacekeeping, peace enforcement and observer missions, it is appropriate to research this topic which has become somewhat a major focus of many armed forces around the world. The Fijian armed forces, and others, are not immune from experiences and events involving their nationals and members of the armed forces who have been cited for criminal acts and atrocities. This concern is multiplied when the acts were done in compliance with illegal orders. This paper will draw out the current positions relating to the law, common law and their application, and at the least provide military commanders and soldiers some answers and guidelines when confronted with the issue of obedience to superior orders, especially when there is concern about their legality.

This thesis is purposely confined to discussing issues relating to the defence of superior orders. It does not address, except in passing, related issues such as command responsibility, rules of engagement and duress. Issues relating to the defence of superior orders will be analysed not only at command level but more importantly from a soldier's perspective. There are quite a number of texts which have been written on this topic, but not much has been dedicated purely to and based on an operational perspective as to the defence of superior orders. Most writing on this subject has an academic approach, with little or no emphasis placed on addressing the current uncertainty that exists relating to this defence, especially now in identifying what the positions are for soldiers as to the defence of superior orders.

This thesis makes reference to a lot of military incidents where the defence of superior orders was in issue. No particular case has been highlighted to ridicule or bring disrepute to any individual or armed forces; on the contrary, these examples serve as a benchmark for armed forces and help soldiers in avoiding the same mistakes in the future. This thesis also uses many examples from varying nations, all in an attempt to have a broader understanding of the subject. Unfortunately, not all countries have had equal mention, for the simple reason that some nations have participated in more conflicts and had more experience in incidents relating to defence of superior orders.

The primary aim of this thesis is to focus on military culture and its association with war crimes and the defence of superior orders, identifying the standards and application which will enable soldiers to distinguish and make determinations relating to legal and

illegal orders. Such an insight will be better understood with reference to national and international developments relating to the defence of superior orders.

This thesis is organized in the following manner. Chapter 2 of the thesis will address how military culture, ethics and virtues have influenced the military profession and created a setting in which obedience to orders have led to war crimes. It will explore the standards that have been adapted by national and international laws, and applied by the courts and tribunals, relating to defence of superior orders and the conditions that need to be satisfied to invoke such a defence. It will cover ways in which military commanders could improve and assist soldiers in better identifying and determining which orders are lawful or not and whether the same should be obeyed. In particular, the difficulty faced by soldiers when it comes to obedience to superior orders will be highlighted, and how this problem is intensified by the existing culture, norm, *modus operandi* and code of conduct that exist in the military. All this has to be balanced in trying to resolve the issues relating to the defence of superior orders and more importantly in deciding whether or not to comply with an order based on the understanding of whether it is legal or not.

Chapter 3 of this thesis will examine in more detail application of the defence of superior orders in armed conflicts and how national and international courts and tribunals have adjudicated and addressed the issue of the defence of superior orders. It shall explore the decisions of the courts and the tribunals and reflect on the standards they evolved from applying the national and international laws relating to laws of war; and specifically the defence of superior orders. It shall seek to determine, to what extent, if any, obedience to

superior orders will be viewed as a legitimate legal defence. In this regard, references will be made to war crimes and tribunals in order to see how they have influenced or attempted to address the issue of the defence of superior orders.

In Chapter 4 of this thesis, a case study will be discussed and used as a basis to test the standards that have been advocated regarding the form of military orders and the defence of superior orders. This case study for any person of common understanding is hard to imagine because of its gross atrocities and brutality. As despicable as it was, it is one of those incidents that is not highlighted very often; however, it serves as a classic example and lesson for soldiers. In this analysis different sets of orders in one particular military mission will be looked at and the position of the soldiers relating to those orders examined. Ways to avoid this incident or at least mimimise casualties will also be raised.

Finally, Chapter 5 of this thesis contains concluding remarks and observations.

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Chapter 2

Obedience to Orders – A Military Culture.

Francisco De Y Lucientes Goya, "The Disasters of War", 1746-1828, in http://homepage.mac.com/dmhart/WarArt/StudyGuides/Goya.html. 1.

"For the common soldier, at least, war has the feel, the spiritual texture, of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapour sucks you in. You cannot tell where you are, or why you're there, and the only certainty is overwhelming ambiguity….You lose your sense of the definite, hence your sense of truth itself…."[23]

[23] Tim O'Brien "*The Things they Carried*" (1990) Broadway Books, New York, 88.

2.0. Introduction.

Undoubtedly, most nations have raised a standing army, both in peacetime and war. For some, the army has been for ceremonial purposes, fulfilling the state's domestic requirements, in according traditional ceremonies to dignitaries or that of other national duties such as funerals, parades, or in relief of natural disasters. There have also been occasions where armies have been used to curb internal security disturbances such as riots, *coup de' etat*, mutinies or threats from insurgents against the general population. Some countries have raised armies so that they could assist another state or international organisation in assisting or suppressing violations against another state or that where a threat has been posed against the world community; for example participation by states when assisting the United Nations in peacekeeping or peace enforcement missions.

There have also been many occasions where states have raised armies to commit acts of aggression against a foreign state. During the First World War, one such state was Germany which developed its military capabilities resulting in its aggression in the Balkans and Europe. The Second World War again saw Germany and Japan rapidly expand their military and naval potential resulting in their aggression and attempt to conquer Europe and the Pacific, respectively. In 1990 and in 2000, we saw a collective formation of coalition forces comprising of forces from the United States of America, the United Kingdom and Australia to fight against Iraq, initially to repel its aggression into Kuwait and later to eradicate weapons of mass destruction.

In all these developments, the countries had increased their fighting equipment and logistics to an amount far beyond their normal capacity. More ships were built; more fighters came off the assembly lines, more arms and ammunition were produced, all in an attempt to fulfill the battle field requirements. As equipment and logistics grew, so did the man force in every army. More servicepersons were enlisted into the ranks. The territorial guard force, reserves and auxiliary forces were recalled for regular duties. These forces were now to be used as an instrument of national policy, whether to attack another state or form an alliance to suppress or eliminate a threat to another nation or the world community at large.

In international armed conflicts, soldiers have become the instruments of war. They have become responsible for the execution of directives of political leaders, government officials and bureaucracy. It is the soldiers who go forward endeavoring to accomplish the policies and tasks assigned, ensuring the success of the mission and the war. In many situations, soldiers just follow orders, knowing that such orders have some relevance to the bigger battle field plan, its success vital to the mission and the war. This perception has been reflected in most cases where soldiers have been charged and convicted of atrocities. In the trial of *United States v Calley,*[24] Calley pleaded that:

> "'Well, I was ordered to go in there and destroy the enemy. That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same, and that was the classification that we dealt with, just as enemy soldiers....I felt then and I still do

[24] (1973) 46 C.M.R. 1131, 1180 – 1181.

that I acted as I was directed, and I carried out the orders that I was given, and I do not feel wrong in doing so, sir.... "

Obedience to orders has taken such an important role in conflicts that soldiers are now left to argue and ponder when not to comply with an order. What is wrong? Why is this happening? Are the current laws inadequate and unclear? Are the current military doctrines and manuals inadequate and of no significant help? Is the defence, obedience to superior orders, raised as merely a smoke screen to camouflage the atrocities and shift blame to avoid punishment? The military culture behind the obedience to orders, the standards outlined as obedience to orders and how they can be improved to resolve the impasse of atrocities being committed under the common plea of obedience to superior orders need to be examined.

2.1. Obedience to Orders: A Military Culture.

As a fighting machine, soldiers are constantly faced with situations that are demanding, changing, and dangerous. The speeding bullet, the exploding grenade or mortar round has no conscience. It does not differentiate friend from foe, the living from the dead; its indiscriminate nature carries with it death, claiming anyone that falls in its path. Despite this adversity, a soldier must be an efficient and reliable instrument in the hands of military commanders. Although there have been evolving developments in the advancement of technology, development of more sophisticated but effective electronic systems, precision weapons and their advanced lethality, and logistical provisions, in

today's warfare, one factor that has remained the same is the conviction amongst soldiers of their loyalty to the armed forces.

All military forces function according to the principles of discipline and obedience to orders. Obedience becomes the cornerstone of a soldier's performance and conduct, be it in training, sports, general duties or war. Obedience to orders is inherent in all conduct. From the day a person marches in for basic training, the principles of discipline and obedience are emphasised; walking, talking, marching, eating, sleeping and any other activity is performed in a systematic and compliant way. Scaling a twelve foot wall, crawling under barbed wire, maneuvering the high wires; all these activities are done with the realisation of danger, but without protest, simply because one was ordered to do so. The emphasis on discipline is so overwhelming that young officers joke that if they were shot in battle, discipline and kava would flow out. The statement was a true reflection of how much emphasis was placed on discipline in a military setting.

As young soldiers marching in to military establishments for basic training, one of the first duties undertaken is the signing of the oath of allegiance and the oath of secrecy. The military system and profession is built on these oaths, ensuring strict and unequivocal compliance to orders. The oaths are a bond or the confirmation of a mutual commitment and alliance between the state and the soldier, an undertaking by the soldier to serve faithfully and with undivided loyalty to the State and its people. With training and commitment, obedience to orders in the eyes of a soldier becomes a must. As Stanley writes on obedience to military orders:

> "It was an accepted principle that military orders should demand and receive absolute and unqualified obedience. Unquestioned dedication was deemed necessary in order to preserve discipline and assure efficiency …. It was soldier's duty to obey his superiors, military and political, and not to impose his views on them."[25]

In order to analyse the rationale behind obedience to superior orders, the reasons why soldiers so readily comply with such orders must be found. There are many reasons soldiers so readily comply with orders; however, the two important areas which stand out are military honour and the interests imposed by military law.

2.1.1. Military Ethics and Virtues.

Grossman wrote that:

> "The soldier in combat is trapped within the tragic Catch – 22. If he overcomes his resistance to killing and kills an enemy soldier in close combat, he will be forever burdened with blood guilt, and if he elects not to kill, then the blood guilt of his fallen comrades and the shame of his profession, nation, and cause lie upon him. He is damned if he does, and damned if he doesn't."[26]

As soldiers charge up a hill, or manoeuver into position for the final assault on an enemy position, they often issue battle cries, upon charging, yelling, 'For God, Queen and Country'. The echo does not only signify their commitment and dedication, more so their allegiance to their God, the Head of State and Country they represent. The honour of being associated with a religion, a particular leader and the people of a country is the

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[25] Edgar Denton, "*Limits to Loyalty*" (1980) Wilfred Laurier University Press, Waterloo, Ontario, 5 – 6.

[26] Dave Grossman, "*On Killing: The Psychological Cost of Learning to Kill in War and Society"*, (1995) Little, Brown & Co, Boston, 87.

driving force behind being a soldier, one of the factors determining the way he or she behaves in battle.

I have participated in numerous peacekeeping and peace enforcement missions, operating amongst soldiers of different nationalities, different religions, with different doctrines of warfare. In the formation of a mission, the desired aim is to accomplish the task and fulfill the mandate given by, for example, the United Nations Security Council. The objective of all the nations participating is the same. Despite being grouped together as one international body, the individuality of each separate nation remains. A contingent of troops would be referred to as the Australian contingent, the Fijian contingent, or the Ghanaian contingent, their area of operation also has such a classification, the Australian Battalion Area of Operation, the Fiji Battalion Area of Operation and the Ghanaian Battalion Area of Operation. Individuality prospers, competition thrives, and the desire for a particular national contingent to excel and perform better than others is ever present. Opportunity to degrade or ridicule one another is never missed and capitalised, as it becomes available.

Military superiority has become a priority and a matter of admiration for most developed nations. In order to accomplish their ambitions, nations have laws that arouse "warlike virtues"[27] The societal values enjoyed by the common people of our society are equally reflected in the military. Basic values such as tolerance, mutual respect, equality and freedom which constitute the societal ideals are not generally opposed. Similarly, military

[27] Aristotle, *Politics*, Book VII, Chapter 2, in Benjamin Jowett (trans), (1885), at http://www.constitution.org/ari/polit_07.htm, 1324b.

virtues are entrenched in military traditions and customs which have been developed in time. The manner in which virtue is acquired is best related by Aristotle, saying:

> "… virtue acquisition implies three stages: (1) we undertake virtuous actions because of the expected pleasure or pain; (2) we adopt role models: virtuous people give the example; (3) we develop a habit of virtuous actions: we become just by doing just acts'.[28]

However somewhat differently, another philosopher has identified virtues as been the foundation of human existence, saying:

> "Now goods are of two kinds: there are human and there are divine goods, and the human hang upon the divine; and the state which attains the greater, at the same time acquires the less, or, not having the greater, has neither. Of the lesser goods the first is health, the second beauty, the third strength, including swiftness in running and bodily agility generally, and the fourth is wealth, … but one who is keen of sight, if only he has wisdom for his companion. For wisdom is chief and leader of the divine dass of goods, and next follows temperance; and from the union of these two with courage springs justice, and fourth in the scale of virtue is courage. All these naturally take precedence of the other goods, and this is the order in which the legislator must place them, and after them he will enjoin the rest of his ordinances on the citizens with a view to these, the human looking to the divine, and the divine looking to their leader mind…"[29]

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[28] Aristotle, "*Nichomachean Ethics*", (Book II), (350 BC), in Benjamin Jowett (Trans), (1885), at http://classics.mit.edu/Aristotle/nicomachaen.2.ii.html, 1

[29] Plato, "*Laws*", (360 B.C.) in Benjamin Jowett (Trans), (1750), http://classic.mit.edu/Plato/laws.htm, 1.631.

If we categories the current traditional military virtues, they will fall under these ideals: loyalty, duty, respect, self service, courage, honour and integrity.

2.1.1.2. Loyalty.

Loyalty like many other concepts is employed by different people on different occasions for different purposes. In our hierarchical society, loyalty is demanded of its entire people.[30] Corporations are demanding from workers productivity in their interest, to the extent we see that agreements are readily entered into to protect the confidentiality and interest of the employer. One may accept that loyalty is not restrictive to the military but a virtue that extends to anyone that acts on the will of someone else. In the military the position regarding loyalty is somewhat different in that it is deemed to be absolute. For example, if we examine the words of Adolf Hitler in addressing his elite SS men on the issue of loyalty, he said, "My honour is my loyalty"[31] For Hitler, the use of the word 'loyalty' was intended to communicate a certain suggestion to his men.

If we relate to the modern military, the ideals are not much different and seem to be more prevalent than before.[32] Generally, there is assent to all orders issued to him and the honour obeying the same without question. If we look at the United States, similar concerns are been echoed. To state the words of Colonel Wakin:

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30 Bruce Fleming, "*Military Loyalty*", (March, 2006), in http://www.military.com/opinion/0,15202,91945,00.html, 1

31 Hannah Arendt, "*The Origin of Totalitarianism*" (1966), Harcourt, Brace & World Inc., New York, 22.

32 Michael O Wheeler, "*Loyalty, Honor, and the Modern Military*", (May – June 1973), Air University Review, in http://www.airpower.maxwell.af.mil/airchronicles/aureview/1973/May-Jun/wheeler.htm, 1.

> "We are concerned, all of us, about a picture of a profession that leaves us feeling that a man must give up his rationality, his very creativeness, the source of his dignity as a man, in order to play his role as a soldier"[33]

For the military, loyalty entails discipline. There is a feeling of cohesion, a team spirit and teamwork amongst the superiors and subordinates, a sense of partnership towards accomplishing a desired task.

When we speak of loyalty, it is commonly referred in two different contexts, the giving and receiving of loyalty. What is more important in the context of obedience to orders is the inspiring of loyalty. For any military commander, to have the undivided loyalty of his troops is not only important but dire in the fulfillment of any mission. Military pundits have quite often argued as to the best approach that needs to be adopted in soliciting loyalty from its troops. The style and method of leadership has varied. Some leaders have sought for blind obedience; other leaders for a reflective obedience. As a tactician and effective military leader of modern time, no better leader than General George C Marshall can be cited when it comes to combat needs. It was said of General Marshall, that:

> "While he would not coddle soldiers, he would not attempt to kill their spirit. 'Theirs not to reason why—theirs but to do or die' did not fit a citizen army, he said. He believed in a discipline based on respect rather than fear; 'on the effect of good example given by officers; on the intelligent comprehension by all ranks of

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[33] Malham M Wakin, "*Integrity First: Reflections of a Military Philosopher*", (2000), Lexington Books, Maryland, 61.

> why an order has to be and why it must be carried out; on a sense of duty, on *esprit de corps*"[34]

My using the leadership style of General Marshall is important in that the temperament of the General's time is more close to ours. Problems faced then are evident now, like raising and equipping an army in times of scarcity, trying to maintain the moral of the military in times where the society is largely antimilitary, trying to develop discipline amongst men and trying hard to coordinate the aims of one's own army to that of one's coalition partners.

Today, most armed forces are from societies that do not advocate a rigid conceived idea of discipline. Soldiers are now exposed to questions of morality and war. There are expectations of one to answer for his actions. If this is true, why do we still experience atrocities that are commissioned through blind obedience or in complete defiance of standing orders and practices? Have we evolved in our practices or have we gone back in accepting established military traditions without questions.

2.1.1.2. Honour.

The honour of being associated with a particular group gives a sense of pride and belonging. No soldier would want to do, or say anything that would bring disrepute to the unit, the force, the country or people they represent. The honour of such an association

[34] Forrest C Pogue, "*George C. Marshall: Global Commander*",(1968), The Harmon Memorial Lectures in Military History 1959 – 1987: A Collection of the First thirty Harmon Lectures Given at the United States Air Force Academy, Office of the Air Force History, Colorado, 321.

becomes so desirable that soldiers readily comply with orders and undertake missions, knowing full well that the same may be suicidal. The pride and honour of dying at the time far outweigh the thought of deserting and failing, hence letting the unit, the force, and the country down. As Starhawk writes:

> "Good soldiers are those who would rather die than be thought cowards. Clearly, the personality of such a soldier cannot be structured around a conviction of his immanent worth. Such obedience can come only from a fundamental insecurity about one's own value, uneasiness so deep that obedience and even death seem a small price to pay for an assurance of one's value. Patriarchy creates that insecurity, making manhood and womanhood into qualities that have to be achieved. Now it becomes somehow possible to be an "unreal man" a characterisation that has nothing to do with one's sexual equipment, but with failure to live up to certain standards that combine willingness to obey with willingness to brutalize."[35]

It cannot be denied that two of the most prevailing thoughts regarding the willingness of soldiers to obey orders and fight is the honour and glory that they fight in the midst and for their comrades. This camaraderie is developed from the intimate and fraternal bond that relates them to their brothers in arms. The soldiers know that they can trust one another, and that he or she will fend for him when a situation arises, the common saying amongst military persons is, 'I watch your back, you watch mine'. The fear of betraying his peers, or that they will hold him in contempt, allows a soldier to fight and obey orders readily. For a soldier to endure such ostracism is unbearable. This factor of camaraderie

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[35] Starhawk, "*Truth or Dare Encounters with Power, Authority and Mystery*", (1988) HarperSan Francisco, San Francisco, 54.

is so important that military leaders have realised its importance towards obedience to orders. In the Second World War, the German hierarchy discovered that the conscript recruits had little commitment to their ideology and military plans. The Germans maintained their fighting spirit by keeping together persons from the same villages and towns together, both in training and in combat. Soldiers who were wounded would return to their unit once treated. The camaraderie was so strong that Osiel writes:

> "To escape combat on account of non disabling wounds, even to linger in a army field hospital rather than returning promptly to battle, was regarded as letting one's comrades down, imposing unfair burdens upon men whose fate had become inextricable from one's own."[36]

The American position was no different during the Second World War and the Vietnam War. Cohesion and solidarity was fostered by grouping soldiers from the same state together. When the African Americans were allowed to go to war, they were grouped together. The results were more appealing and military objectives were more readily executed and achieved. Undoubtedly, the honour of being associated with a group, the camaraderie of being brothers at arms made soldiers more compliant and susceptible to obedience to orders.

Another factor which makes soldiers readily follow orders is the conviction within, of a personal honour. On many occasions, soldiers have engaged in battle without the slightest worry for their lives and the danger posed by the imminent threats. The engagement is

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[36] Mark J Osiel, "*Obeying Orders: Atrocity, Military Discipline & the Law of War*", (1999), Transaction Publishers, New Brunswick, New Jersey, 213.

usually a result of a desire to acquire personal honour and recognition for oneself. The acceptance and praise gained from a particular mission is so rewarding that soldiers readily follow orders. The quest for acquiring personal honour at times becomes so great that soldiers fail to differentiate a lawful from an unlawful order.

In an effort to gain acceptance and recognition, personal honour becomes a driving factor for soldiers, individual interest becomes paramount. This factor is so dominating that at times it overrides loyalty to the institution and the oath of allegiance undertaken. The interest of trying to justify one's action or bravery becomes so immense that soldiers at times lose sight of the role and duty which they have been ordered to perform. Recognition of an individual performance becomes far more important than the achievement of the unit or the force. As Carper writes:

> "An institution which demands sacrifices can frequently create legitimacy for itself because of a strong tendency in human beings to justify to themselves sacrifices they have made. We cannot admit that sacrifices have been made in vain, for this would be too great a threat to our image of ourselves and our identity."[37]

It is quite imperative that soldiers associate themselves with the honor of being associated with a group, a country or individual. This recognition or sense of belonging to an elite class brings about a readily accepted obedience to orders and a will to fight. It is on this platform, of being honoured, that loyalty, discipline and obedience are accomplished. It is these virtues that determine the conduct of a soldier on the battlefield, how he or she acts

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[37] Jean Carper, "*Bitter Greetings: The Scandal of the Military Draft*", (1967) Grossman Publishers, New York, 23.

and behaves and more importantly how he or she interprets an order and engages accordingly. This factor is important especially when addressing the standards that need to be adopted when distinguishing lawful and unlawful orders, and how best to resolve the impasses created in deciding when and how to act on a lawful or unlawful order?

2.1.2. Military Obedience: Compliance under Military Law.

The military profession and soldiering is unique compared to any other professions that exist. Firstly, soldiers are subjected to three forms of law, the domestic law of the state, international laws that are in existence and to which the state has become party to and lastly, military law. Unlike soldiers, the general public is usually bound by the domestic laws and rarely, if a situation warrants it to international law. Secondly, the military profession is one where from the outset, a person has to deal with matters of life and death. Soldiers are trained and instructed to identify the ‘enemy’, how to kill or capture him or her, and in the interest of the state, to repel or destroy any adversary that poses a threat to the state.

Another unique factor of the military profession is that unlike other professions, for example, a lawyer, doctor, or an engineer, there is no possibility of changing the place of service without changing profession. Civilians can move from one government service to another or into private practice. For a soldier, this luxury does not exist. A soldier cannot leave the profession and still practise it. A soldier, who leaves the military profession for good, ceases to become one and as such is classed as any other ordinary citizen of the state.

The ability for any Armed Forces to function effectively and efficiently is determined by the standards it displays in time of peace and war, usually equated in terms of the fighting ability of the Force. The effectiveness of the fighting power of the state lies in the ability to get its soldiers to fight. The fighting soldier is required to be committed, have the willingness for self sacrifice, by putting the interest of the mission and the force before his own, and be able to develop mutual trust. This quality of a soldier enhances and develops the fighting power of the force.[38]

The greatest challenge for any armed forces is its ability to be prepared to deploy for any military operations in the least possible time. For this to be possible, the forces must act as one unit, as a disciplined force. Upon deployment the military commanders do not have an opportunity for second guessing. They must be sure that the soldiers under their command will follow orders and that mutual trust amongst soldiers exists. The unit must not function as individuals but that of one fighting group. It is this cohesion, commitment, and trust that will ensure the success of the mission and the survival of the soldiers. For the success of the mission and its effectiveness, discipline amongst the soldiers is important. This may involve self discipline, commitment, trust, and obedience to the standing and routine orders. At times, when discipline is lacking, it then becomes the responsibility of commanders to enforce it.

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[38] Fyodor Dostoyevsky, "*The House of the Dead*", (1959) Dell Publishing Company, New York, 1

The enforcement of discipline is achieved by invoking the military legal system, which is designed to deal with disobedience and other breaches of law. All Armed Forces have their military law, being codified as an Act or a Code. For example, in the United Kingdom, and the same military law currently being applied in Fiji, the 'Army Act' is contained in the "Manual of Military Law".[39] In addition, the Army Act of the United Kingdom recognizes the existence of other legislation regulating the conduct of service person, one such item of legislation being the Queens Regulation for the Army.[40] The purpose of military law and discipline is discussed in the Queens Regulation for the Army (United Kingdom), stating:

> "… the rationale for military discipline:
>
> Discipline, comradeship, leadership, and self respect form the basis of morale and of military efficiency. Good discipline within the unit is the foundation of good discipline throughout the Army and is based on good man management. It is therefore essential that every soldier should be brought to understand not only the importance, but the purpose of discipline; that indiscipline has no place in the Army, and that in war it may have serious effects or even lead to disaster. All officers, warrant officers and NCOs are to maintain discipline over officers and soldiers of lower rank than themselves."[41]

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39 Command of Defence Council, Ministry of Defence, "*Manual of Military Law*" 12 edition, (1972) Her Majesty's Stationary Office, London, 1.

40 Command of Defence Council, Ministry of Defence, "*Queens Regulation for the Army 1975*", (1975) Her Majesty's Stationary Office, London, 1.

41 Paragraph 5.201, Command of Defence Council, Ministry of Defence, "*Queens Regulation for the Army 1975*", (1975) Her Majesty's Stationary Office, London, 1.

The existence of military law and discipline is so vital to the existence and function of the military that individual conduct is scrutinized at all levels of the military hierarchy. For example, normally a dirty boot or being unshaven may not necessarily attract any disciplinary action in a civilian environment. However, in the military, such conduct would definitely bring about a military charge with punishments ranging from reprimands to fines. Such convictions and sentences are then reflected on the individuals conduct sheet for years to come, at times affecting promotion and other service benefits.

In the military, compliance to an order is taken very seriously, especially when involving such things as fatigues, training, assaulting enemy positions in the midst of on coming enemy machine gun fire or even shooting and killing the enemy. The commanders must be satisfied in their minds that the soldiers under their command engaged in such military operations will obey the orders that are issued, knowing very well that the success or failure of such a mission is dependant upon the obedience of such orders. To bring about compliance amongst soldiers and at the same time provide relief to military commanders, disobedience of military orders has been classed as an offence and attracts severe consequences.

In the British Army, the offence of disobedience to orders is provided at section 34 and 36 of the Army Act 1955, as follows:

> **Disobedience to lawful commands**
>
> "**34**. Any person subject to military law who, whether willfully or through neglect, disobeys any lawful command (by whatever means communicated to

him) shall, on conviction by court-martial, be liable to imprisonment or any less punishment provided by this Act."[42]

Disobedience to standing orders

36. - (1) Any person subject to military law who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him, or which he might reasonably be expected to know, shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

(2) This section applies to standing orders or other routine orders of a continuing nature made for any formation or unit or body of Her Majesty's forces or for any command or other area, garrison or place, or for any ship, train or aircraft." [43]

There are numerous cases where service persons have been tried for disobeying a lawful command. As an example, the statistics cited by Chris Baker for court martials instituted during the First World War:

> "In all, 5,952 officers and 298,310 other ranks were court-martialed. This amounts to just over 3 percent of the total of men who joined the army. Of those tried, 89 percent were convicted, 8 percent were acquitted; the rest were either convicted without the conviction being confirmed, or with it being subsequently quashed. Of those convicted, 30 percent were for absence without leave; 15 percent for drunkenness; 14 percent for desertion (although only 3 percent were

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42 Command of Defence Council, Ministry of Defence, "*Manual of Military Law*" 12 edition, (1972) Her Majesty's Stationary Office, London, 296.

43 Ibid at 300.

> actually in the field at the time); 11 percent for insubordination; 11 percent for loss of army property, and the remaining 19 percent for various other crimes.
>
> The main punishments applied were: 3 months detention in a military compound – 24 percent; Field Punishment Number 1 – 22 percent; Fines – 12 percent; 6 months detention – 10 percent; reduction in rank – 10 percent; Field Punishment Number 2 – 8 percent. 3.080 men (1.1 percent of those convicted) were sentenced to death. Of these, 89 percent were reprieved and the sentence converted to a different one. 346 men were executed. Their crimes included desertion - 266; murder - 37; cowardice in the face of the enemy - 18; quitting their post - 7; striking or showing violence to their superiors - 6; disobedience - 5; mutiny - 3; sleeping at post - 2; casting away arms - 2. Of the 346, 91 were already under a suspended sentence from an earlier conviction (40 a death sentence).[44]

There were some eleven cases where soldiers were executed for disobeying lawful orders. Military history tells us that the first person to die in battle in the First World War was Sergeant Francis Hayes.[45] The last man to die was Private Michael Keaty, from Dromlara, Pallasgrean. The first soldier to be executed for disobedience was Private Patrick Joseph Downey from Limerick City.[46] The case against Private Downey was that on November 26th, 1915, when ordered by his Company Sergeant Major Bagnall to fall in on parade; he stood fast, and then refused to put on his cap when ordered to do so by Captain Cradock. Private Downey had enlisted as a volunteer in September 1914 at the

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44 Chris Baker, "*The Long, Long Trail*", (2003) http://www.1914-1918.net/crime.htm, 1 – 2.

45 Ron Kirwan, "*They shall not grow old…*", (10 Nov., 2001) Limerick Leader, http://www.limerick-leader.ie/index.html, 4.

46 Ibid at 4.

age of 18. He was serving with the 6th Battalion Leinster Regiment, part of the 10th (Irish) Division in Salonika.

Private Downey was subsequently charged with:

> "On active service disobeying a lawful command in such manner as to show willful disobedience of authority given by his superior officer in the execution of his duty"[47]

As Kirwan writes:

> "Pte Downey should have been made to plea "not guilty"…. The court sentenced Patrick to suffer death by firing squad. On hearing the sentence, Downey was alleged to have laughed, saying: "That is a joke, you let me enlist and then bring me out here to shoot me.
>
> The sentence passed by the court was agreed unanimously and the proceedings were referred to Lt General Brian Mahon, officer commanding British Forces in Greece. Before forwarding the papers to General Munroe, commander-in-chief, Mediterranean Expeditionary force, Mahon remarked: "Under ordinary circumstances I would have hesitated to recommend that the capital sentence awarded be put into effect as a plea of guilty has erroneously been accepted by the court, but the conditions of discipline in the battalion is such as to render an exemplary punishment highly desirable and I therefore hope that the commander-in-chief will see fit to approve the sentence of death in this instance.-B Mahon,

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[47] Ibid.

> Lieutenant General Commanding, HQ British Forces, Salonika, 12th December 12, 1915.'".[48]

At dawn on Monday, December 27, 1915, at Eurenjik, a firing party was assembled from the Durham Light Infantry under the command of Capt Charles Villers, assistant provost marshal, 10th (Irish) Division. Private Downey was executed and was buried in Mikra British Cemetery, Kalamaria, Greece in grave 1386.[49] The reason for the execution was later suggested to be one to set an example and to quell insubordination which had become evident amongst the ranks.

In the United States Armed Forces, similar provisions exist making it unlawful to violate or refuse to obey a lawful order which the soldier has a duty to obey. Article 90 to 92 of the Uniform Code of Military Justice provide as follows:

> **"Article 90— Assaulting or willfully disobeying superior commissioned officer:**
>
> "Any person subject to this chapter who—
>
> (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or
>
> (2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

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48 Ibid at 4 - 6.

49 Ibid at 6.

Article 91— Insubordinate conduct toward warrant officer, NCO, or PO

"Any warrant officer or enlisted member who—

(1) strikes or assaults a warrant officer, non-commissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct."

Article 92— Failure to obey order or regulation

"Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct."[50]

[50] United States Code of Military Justice, (2002) www.constitution.org/mil/ucmj19970615.htm, section 890 – 892.

As in the British Forces, there have been incidents where soldiers who were serving with the United States Armed Forces were court martialed for disobeying a lawful command. The case of the "Battle for Jackson Heights"[51] involving the 65th Infantry Regiment serving in Chorwan Valley of North Korea serves as a classic example of the emphasis put on obedience to lawful command and at the same time shows how the status quo of a fighting force was maintained.

The 65th Infantry Regiment serving in Chorwan Valley of North Korea was comprised of soldiers from Puerto Rico. The unit had been serving in the United States Forces since 1899. During the Korean War in 1952, the Chinese and the United Nations Forces were located in strategic positions in the Chorwan Valley. In the fall of 1952, a major offensive took place between the opposing forces resulting in the "Battle for Jackson Heights"[52]. The events of the battle were narrated as follows:

> "During October, Chinese forces launched yet another series of strong local offensive operations aimed at seizing key terrain in Eighth Army's western and central sectors.[53] These included an attack against Jackson Heights in the 3rd Infantry Division sector…. On 22 October the regiment moved from Changmol to Topi-dong, two miles north of Chorwon, to relieve elements of the 51st ROK Regiment, 9th Division, on Line Missouri. Missiouri constituted the central portion of the main defensive line of the UN forces. It crossed near the heart of

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51 Silvestre E Ortiz, Report by the Department of Army's Center of Military History, "*Historic Review on the 65th Infantry Regiment Court-martial*, (1952 – 53) in http://www.prari.org/th65th.pdf, 1

52 Ibid.

53 Attached as Appendix 1 the Eighth Army disposition during "Jackson Heights" Battle.

the Iron Triangle…. The regiment adapted to the task by deploying with two battalions forward and one battalion to the rear. The outpost at Jackson Heights was located on the eastern edge of the Chorwan Valley, approximately eight miles northeast of Chorwon and six miles southwest of Pyonggang, North Korea. It comprised the southern portion of a large hill known as Iron Horse Mountain (Hill388). The peak of Iron Horse Mountain, located 750 meters to the north of Jackson Heights, and a second hill known as Camel Back Mountain (Hill 488), located 2,800 meters to the northeast, dominated the position. Located more than a mile in front of the main defensive line, the position at Jackson Heights consisted of solid rock. All of its bunkers, as a result, were in unsatisfactory condition. Complicating matters, the position lacked barbed wire and mines because of supply shortages and heavy enemy pressure dogged every attempt to make even marginal improvements in its defenses. Company G had charge of the outpost. Facing it were elements of the 3rd Battalion, 87th Regiment, 29th Division, 15th CCF Army, well supported by artillery. Enemy action against the outpost followed closely on the heels of the 65th's arrival. Shelling began at 1100 on 25 October and continued throughout the day and into the evening. Enemy patrols probed the position twice the next morning but were repulsed each time. Shelling continued that day, and by the evening of the 26th the 65th had suffered a total of 24 casualties. Chinese shelling resumed at 1000 on the morning of the 27th with much heavier concentrations than on the previous two days. In short order a CCF mortar round hit Company G's ammunition supply. Much of the unit's 60-mm mortar ammunition went up in the conflagration that followed. By

1245 the company had suffered another twelve wounded, and its commander, Captain George D. Jackson, was radioing higher headquarters for assistance in evacuating the company's wounded from the position. By 1700 all but seven members of the company's Mortar Platoon were casualties and only two mortars were still in action. At 1800 Jackson Heights received another heavy shelling, this time followed by a reinforced company-size attack consisting of an estimated 250 men and supported by fire from nearby enemy positions. Company G repelled the attack but at the cost of 14 more friendly casualties. That night, the company's listening posts detected large numbers of enemy troops positioning themselves to the east and west of the position. Jackson attempted to call in artillery fire only to be informed that he had an allocation of only 100 illumination and high explosive rounds for the night. The Chinese thus moved unmolested to their assault positions. Tensions increased as night fell. Between 2035 and 2100 the Chinese unleashed an immense artillery and mortar barrage on Jackson Heights. Charging from two directions but mainly from the southeast, two companies of Chinese infantry attacked at 2100. Company G responded with small arms fire and its remaining mortar rounds, but its ammunition dump was hit a second time, causing confusion among its men.

Casualties mounted. Jackson called for final defensive artillery fires at 2120. They inflicted heavy losses on the enemy, allowing Company G to begin withdrawing at 2130. By 2240 the unit's first elements were safely behind the 65th's main defensive line. The company had suffered 87 battle casualties. On October 28,

Colonel DeGavre ordered his 2nd Battalion under Lieutenant Colonel Carlos Betances-Ramirez to retake Jackson Heights. Since the battalion already had responsibility for a major sector of the 65th's main defensive line, however, Betances- Ramirez planned to use only one of his companies for the attack, Company F. He received permission to borrow a second, Company A, from the 1st Battalion. Once Jackson Heights had returned to American hands, he intended to use Company F to remain on position to defend the outpost while Company A returned to its parent unit. As is often the case in war, however, when forces from more than one unit are involved, the colonel's intentions were garbled in transmission. Confusion immediately arose within the two units over which would stay to defend the heights and which would depart. The attack began at 0645 on 28 October. By 0955 Company F was on the objective and was reporting it secured. By 1115 both companies were on the hill, having taken 17 casualties while inflicting 22 casualties on the enemy. Although the operation had gone extremely well, it soon began to deteriorate, with each company commander thinking his stay on the position was temporary. In the confusion that followed, the men of the two companies became intermingled, destroying the cohesion of the outpost's defense and presenting the Chinese with a lucrative target. As enemy artillery and mortar rounds slammed into it, inflicting numerous casualties, the defending troops began to move off the position. With the situation deterioration the Company A Commander, 1st Lieutenant John D. Porterfield, called a meeting of his officers to decide what to do next. The group convened, however, before a Chinese 76-mm round fired from Camel Back scored a direct hit on it, killing

Porterfield, his artillery forward observer, and one of his platoon leaders , along with an officer from Company F. The death of these leaders had an immediate impact on the men, who began to abandon the position in even larger numbers.

Since communication with the two companies had gone down during the attack, Colonel Betances-Ramirez only learned of the situation at 1500. He ordered Company F to remain on Jackson Heights and Company A to return to the main defensive line. There matters stood until 1705, when the 2nd Battalion command post received a message from Caption Cronkhite on Jackson Heights stating that the fighting strength remaining on the position was down to ten men and requesting permission to withdraw. At 1715, a lieutenant from Company H reported that some 80 men from Companies A and F had congregated in the vicinity of Hill 270 and were refusing to go back to Jackson Heights. Betances-Ramirez ordered these men, including 1st Lieutenant Juan Guzman, a Puerto Rican National Guard officer and the Company A Executive Officer, to go back up the hill to join Captain Cronkhite. Regarding the order as suicide, most of the men again refused. At approximately 1730, Cronkhite ordered the remaining men on Jackson Heights to withdraw. That evening Colonel DeGavre recommended that the division reinforce its main defensive line and that it discontinue attempts to retake Jackson Heights for the night. Both recommendations were approved, but the respite for the regiment was brief. Early in the morning of 29 October, Company C, commanded by 1st Lieutenant Robert E. Stevens, departed the 1st Battalion area for Jackson Heights. The unit reported the objective secured at

0720, but shortly thereafter its men began abandoning the position. By 1050, 58 of them had assembled near the battalion command post. The number grew over the hours that followed, even though 80 agreed to return to the hill. In the end, the 1st Battalion Commander, Major Albert C. Davies, had little choice but to order Stevens and those of his men who remained to return to the main defense line. The equivalent of "a company less its officers and a few men," wrote Colonel DeGavre afterward, withdrew from Jackson Heights without an enemy round being fired or a live enemy being sighted. [since] there were, however, bodies of both friendly and enemy dead on the position… [the] unauthorized withdrawal is believed to have been solely from fear of what might happen to them. On 29 October, the 3rd Division relieved the 65th of its sector along Line Missouri. The next day the regiment, less its 3rd Battalion which remained on the line under the 15th Infantry regiment, reverted to IX Corps reserve at Sachong-ni, North Korea. The 65ht had suffered a total of 259 casualties for the month, including 14 officers. Of these, 121, including 97 battle casualties and 24 non-battle casualties, occurred while the regiment was stationed on Line Missouri. The reputation of the regiment and the Puerto Rican soldier, which had suffered a heavy blow after the battle of Out Post Kelly[54] was shattered irreparably. A total of 123 Puerto Rican personnel, including one officer and 122 enlisted men, were in the division stockade pending court-martial for refusing to attack the enemy as ordered and misbehavior before the enemy. The regiment's only Puerto Rican commander, Colonel Betances-Ramirez, had been relieved of his command. To make matter

[54] Attached as Appendix 2 the Ariel view of Out Post Kelly and the surrounding positions sketch.

> worse, on 3 November, 39 more enlisted men of the 3rd Battalion's Company L refused to continue with a patrol while attached to the 15th Infantry regiment in the vicinity of Jackson Heights. They were also placed under arrest. The following day, the 3rd Division's commander pulled the 3rd Battalion out of the line at the request of the 15th Regiment's commander.[55]

Shortly after the "Battle for Jackson Heights", the United States Army conducted its largest court martial. First Lieutenant Juan Guzman, the first tried, faced General Court-Martial on 23 November, less than three weeks after being charged. He was found guilty of willful disobedience of a lawful command to move his platoon to Jackson Heights and received a dishonorable discharge, forfeiture of all pay and allowances, and five years confinement with hard labour. On 7 December the first group of enlisted men from C Company were tried, convicted and sentenced to dishonourable discharges, forfeiture of all pay and allowances and 1-2 years confinement at hard labour. On 10 December, 5 men from Company C were tried, convicted and sentenced to 13 years confinement at hard labour. On 15 December, Four men from Company L were tried, convicted and sentenced to 16 to 18 years confinement at hard labour. On December 26, the eleven soldiers from Company F were tried, convicted and sentenced to hard labor. In January 1953, the last four members of the regiment were tried and acquitted. In total, of the 95 men court-martialed, 91 were found guilty. In 1954 amidst public outcry and support from political leaders, all convicted soldiers received clemency or pardons. The majority returned to service with the regiment.

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55 Silvestre E Ortiz, Report by the Department of Army's Center of Military History, "*Historic Review on the 65th Infantry Regiment Court-martial*, (1952 – 53) in http://www.prari.org/th65th.pdf, 1

Although the events of the “Battle of Jackson Heights” happened sometime ago, the position regarding obedience to lawful orders and military professionalism has remained unchanged. Armies continue to emphasise and indoctrinate their soldiers in the need to comply with and adhere to lawful orders. I can recall my instructors often yelling in our military academies and continue doing so today, ‘yours is not to reason why, yours is to do and die’. The military law provisions that exist in the Australian and Singaporean Armed Forces illustrate this position on obedience which is observed by many other jurisdictions.

The conduct of the Australian Defence Force personnel is regulated by the *Defence Force Discipline Act 1982.* Section 27 to 29 of the Act provides that it is an offence to disobey and fail to comply with lawful orders. Section 27 reads:

“Disobeying a Lawful Command

27. (1) A defence member is guilty of an offence if:

(a) a person gives the member a lawful command; and

(b) the person giving the command is a superior officer; and

(c) the member disobeys the command.

Maximum punishment: Imprisonment for 2 years.

(2) Strict liability applies to paragraph (1)(b) and (c).

(3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, that the person who gave the command was a superior officer.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.' ADFP201 VOL 1

a.That the accused was a defence member (physical element of circumstance). In almost all circumstances the accused person will know and admit that they are a defence member;

b. That the accused was reckless as to the fact that he or she was a defence member (default fault element of recklessness). Recklessness can be established by proving intention, knowledge or recklessness. In almost all circumstances the accused person will know and admit that they are a defence member. If there is no admission, the prosecution must prove recklessness;

c. That a person gave the accused a specified lawful command (physical element of circumstance);

d. That the accused was reckless as to the matter in (c) (default fault element of recklessness, noting that recklessness can be established by proving intention, knowledge or recklessness);

e. That the person who gave the command was, at the time, a superior officer of the accused (physical element of circumstance); and

f. That the accused disobeyed the command (physical element of conduct).

NOTE: There is no requirement for the prosecution to prove a fault element on the part of the accused in relation to the physical elements in (e) and (f) as these are elements of strict liability under s.27(2).

DFDA DEFENCES:

a. The accused may raise the statutory defence under s.27(3) that he or she neither knew, nor could reasonably be expected to have known, that the person who gave the command was a superior officer; and

b. If raised, the accused must prove this defence on the balance of probabilities.

Failing to Comply with a Direction in Relation to a Ship, Aircraft or Vehicle

4.81 Section 28 of the DFDA provides as follows:

28. (1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) the person is in or near a service ship, service aircraft or service vehicle; and

(b) the person is given a lawful direction by, or with the authority of, the person in command of the ship, aircraft or vehicle; and

(c) the direction:

(i) relates to the sailing or handling of the ship, the flying or handling of the aircraft or the handling of the vehicle; or

(ii) affects the safety of the ship, aircraft or vehicle or of the persons on board the ship, aircraft or vehicle; and

(d) the first-mentioned person does not comply with the direction.

Maximum punishment: Imprisonment for 2 years.

(2) Strict liability applies to paragraph (1)(d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code.*

(3) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.'

Failing to Comply with a General Order

4.82 Section 29 of the DFDA provides as follows:

29. (1) A person who is a defence member or a defence civilian is guilty of an offence if:

(a) a lawful general order applies to the person; and

(b) the person does not comply with the order.

Maximum punishment: Imprisonment for 12 months.

(2) An offence under subsection (1) is an offence of strict liability..

Note: For *strict liability*, see section 6.1 of the *Criminal Code.*

(3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, of the order.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*."[56]

The Australian provisions relating to obedience to lawful orders are more comprehensive than other national military law provisions. A distinctive feature in the Australian

[56] Australian Government Department of Defence, *Defence Force Discipline Act 1982,* (1982) www.defence.gov.au/legal/102/5709_3.pdf, 4 – 1, 4 – 59 to 4 – 66.

Defence legislation is the provisions relating to the defences available when adhering to a lawful command, and the different types of orders that are issued. The varying provisions at least allow some demarcation and evaluation of orders issued by commanders. The recognition of routine, standing and regulated orders is distinguished from battle field orders, allowing more liberty and analysis of the same. This matter is important, and if identified and rationalized properly, will eliminate a lot of impasses that arise from legal and illegal orders.

In the Singaporean Armed Force, the conduct of service persons is regulated by the Singapore Armed Forces Act. The military law provisions contained are similar to those prescribed for other service members of foreign jurisdiction relating to the obedience to lawful command. The relevant provisions of the Singaporean Armed Forces Act are provided at Sections, 17, 21, and 40, and read as follows:

> "**Disobedience of, non-compliance with lawful orders, etc.**
>
> **17.**—(1) Every person subject to military law who by words or behavior willfully disobeys any lawful order, by whatever means communicated to him, shall be guilty of an offence and shall be liable on conviction by a subordinate military court to imprisonment for a term not exceeding 3 years, and, if the offence is committed during active service, such person shall be liable on conviction by a subordinate military court to imprisonment for a term not exceeding 7 years or any less punishment authorised by this Act.
>
> (2) Every person subject to military law who does not comply with any lawful order or neglects to perform or negligently performs any lawful duty or order

shall be guilty of an offence and shall be liable on conviction by a subordinate military court to imprisonment for a term not exceeding 2 years, and, if the offence is committed during active service, such person shall be liable on conviction by a subordinate military court to imprisonment for a term not exceeding 5 years or any less punishment authorised by this Act.

Disobedience of general orders

21. Every person subject to military law who contravenes or fails to comply with any lawful provision of general orders, being a provision known to him or which he might reasonably be expected to know, shall be guilty of an offence and shall be liable on conviction by a subordinate military court to imprisonment for a term not exceeding 2 years or any less punishment authorised by this Act.

Disobeying lawful command of captain of ship

40.—(1) Every person who, when in a ship, disobeys any lawful command given by the captain of the ship in relation to the navigation or handling of the ship or affecting the safety of the ship, shall be guilty of an offence and shall be liable on conviction by a subordinate military court to imprisonment for life or any less punishment authorised by this Act.

(2) For the purposes of this section, every person whatever his rank shall, when he is in a ship, be under the command, as respects all matters relating to the

navigation or handling of the ship or affecting the safety of the ship, of the captain of the ship."[57]

The presence of the legal provisions reinforces the soldier's commitment to following orders. Undoubtedly, there are very few exceptions regarding compliance when the orders are legal. Military professionalism has been fostered and enhanced through strong bonds, created through the soldier's association with a unit, a force or a country. The few regulatory provisions cited are a clear indication of not only the need but the willingness amongst armed forces to invoke and enforce compliance to orders. This in turn allows commanders to have able fighting soldiers, disciplined and committed, ready to engage in any combat situation when ordered.

This position, that soldiers must follow legal orders, is acceptable as long as the orders are within the bounds of the existing military, national or international laws regulating operational conduct. What happens when the orders are outside the parameters of a lawful order? Is non compliance to illegal orders permissible under the current laws and regulations? Is non compliance to illegal orders obligatory or mandatory under the circumstances? What standards, if any, are available to soldiers, in determining legal from illegal orders? The existing legal provisions, common law and the standards to be adopted in resolving this impasse need to be analysed.

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[57] Singapore Ministry of Defence, "Singapore Armed Forces Act – Cap 295", (15 June 1972) www.mindef.gov.sg/safti/saftilibrary/singapore.html, 18 and 22.

2.2. Standards in the obedience to orders: To follow or not to follow orders?

The International Criminal Courts after the Second World War, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda offered no defence as to the obedience of superior orders. This position has somewhat changed with the introduction of the new Rome Statute of the International Criminal Court. To determine what standards are to be fulfilled to successfully invoke a defence of obedience to superior orders, different national statutes and the Rome Statute of the International Criminal Court will be examined to see the conditions that need to be satisfied.

Since the issue of a defence of superior orders gained prominence after the prosecution of German nationals arising from the Second World War, it is apt to look first at these examples. The first of the laws implemented in Germany after the Second World War which provided for the defence of superior orders was contained in the 1957 German Criminal Military Code. Section 5 (1) of the Code provides that:

> "A subordinate who, in the compliance with a superior order, has violated the actual prohibition of a punishable offence will only be liable to punishment if it was known to him, or it was manifest from the circumstances known to him, that the act was unlawful."[58]

More recently, the German parliament has introduced the Code of Crimes against International Law. Section 3 of the Code of Crimes against International Law provides:

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[58] Collection of the National Reports related to the first part of questionnaire on Investigation and prosecution of violation of the Law of Armed Conflict, XIV International Congress of the International Society of Military Law and Law of War, (10 – 15 May 1997), 93.

"Whoever commits an offence pursuant to Section 8 to 14 in execution of a military order or an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is not manifestly unlawful."[59]

In Canada, similar provisions are provided by the Criminal Code, Canadian Crimes against Humanity and War Crimes Act, and the National Defence Act. Section 15 of the Criminal Code provides that:

> "No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs."[60]

In relation to the suppression of riots, Section 32, of the Code further provides that:

> "Person bound by military law:
>
> (2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.
>
> Obeying order of peace officer

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59 "*German Code of Crimes against International Law*", (26 June 2002), Translation by Planck M in Implementing Laws and Regulations – Text Codes of Crimes against International Law, http//:www.icrc.org/ihl–nat.nsf/0/09889d9f415e031341256c770033, 1.

60 Department of Justice, Canada, "*Criminal Code*", Chapter C–46, (1985) http://laws.justice.gc.ca/en/C-46/text.html, 31.

> (3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if:
>
> (*a*) he acts in good faith; and
>
> (*b*) the order is not manifestly unlawful."[61]

A peace officer, for these purposes includes, any non-commissioned members of the Canadian Forces who are appointed under the National Defence Act.

The Canadian Crimes against Humanity and War Crimes Act was implemented to ratify the 1998 Rome Statute of the International Criminal Court. In relation to the defence of superior orders, Section 14 of the Act provides:

> "(1) In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior -- whether military or civilian -- to perform the act or omission that forms the subject-matter of the offence, unless
>
> (*a*) the accused was under a legal obligation to obey orders of the government or superior;
>
> (*b*) the accused did not know that the order was unlawful; and
>
> (*c*) the order was not manifestly unlawful.

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[61] Ibid at 41.

Interpretation -- manifestly unlawful

(2) For the purpose of paragraph (1)(*c*), orders to commit genocide or crimes against humanity are manifestly unlawful.

Limitation -- belief of accused

(3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group."[62]

The National Defence Act of Canada does not have any provisions per se relating to the defence of superior orders. However, the Act recognises that any defence that is available in the civil courts becomes available in military jurisdiction. Section 151 of the Act states:

"All rules and principles from time to time followed in the civil courts that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline."[63]

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62 Ibid at 9.

63 Ibid at 40.

Arguably, the accepted conditions as provided under the Criminal Code would extend to military courts, thereby allowing consideration for such a defence, at the same time setting parameters as to what circumstances such defences will become available in.

In Australia, the provisions relating to a defence of superior orders are provided in the Criminal Code (Commonwealth), the Defence Force Discipline Act 1982.

Section 268. 116 of the Criminal Code Act 1995 (Commonwealth) provides:

> "(1) The fact that genocide or a crime against humanity has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.
>
> (2) Subject to subsection (3), the fact that a war crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.
>
> (3) It is a defence to a war crime that:
>
> (a) the war crime was committed by a person pursuant to an order of a Government or of a superior, whether military or civilian; and
>
> (b) the person was under a legal obligation to obey the order; and
>
> (c) the person did not know that the order was unlawful; and
>
> (d) the order was not manifestly unlawful.
>
> Note: A defendant bears an evidential burden in establishing the elements in subsection (3). See subsection 13.3(3)."[64]

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[64] Australian Government, Attorney Generals Department, "*Criminal Code (Commonwealth)*", (1995), http://www.comlaw.gov.au/ComLaw/Legislation. 277.

Under the Defence Force Discipline Act 1982, the defence of superior orders seems to have a wider application. Section 14 of Part II of the Act provides:

> "**Act or omission in execution of law etc.**
>
> A person is not liable to be convicted of a service offence by reason of an **act** or omission, that:
>
> (a) was in execution of the law; or
>
> (b) was in obedience to:
>
> (i) a lawful order; or
>
> (ii) an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful."[65]

In additional to the above provisions relating to the defence of superior orders, the Australian Defence Force Discipline Regulations 1985 further provides for the application of the criminal defences as provided in the Criminal Code (Commonwealth) 1985.[66]

It must be noted that the Americans due to certain reservations regarding the provision of the 1998 Rome Statute of the International Criminal Court refused to ratify. This refusal led the Americans to enter into an Article 98 agreement with other states, an agreement which restricts the third state from handing over any Americans to be tried by the

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65 Australian Government, Department of Defence, "*Defence Force Discipline Act 1982*", (1982) http://www.defence.gov.au/legal/126/62241.pdf., 9.

66 Australian Government, Department of Defence, "*Defence Force Discipline Regulations 1985*", (1985) http://www.comlaw.gov.au/comlaw/legislation/legislativeinstrumentcompilation1.nsf/0/906C459FEB3C9923CA256FD40020AFA4/$file/DefForceDiscipWD02.pdf., 5.

International Criminal Court. This implied immunity has somewhat restricted the jurisdiction of the International Criminal Court. The only legal provisions that deal with the defence of superior orders are found in the United States Manual for Court Martial. Rule 916 (d) of the Manual for Court Martial provides:

> "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[67]

The last national statutes that reference will be made to is those of the United Kingdom. Although the United Kingdom ratified the 1998 Rome Statute of the International Criminal Court through the International Criminal Court Act,[68] the military provisions that exist relating to the defence of superior orders will be addressed. The conduct of the servicepersons of Her Majesty's Force is regulated by the Manual of Military Law, contained in the Army Act 1955. Paragraph 23 of the Manual of Military Law provides that:

> "If a person who is bound to obey a duly constituted superior receives from the superior an order to do some act, make some omission which is manifestly illegal, he is under legal duty to refuse to carry out the order and if he does carry it out, he will be criminally responsible for what he does in doing so".[69]

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67 United States Department of Defence, "*Manual for Court Martial 2000*", (2000 edition) http://www.jag.navy.mil/documents/mcm2000.pdf., I, I – 111.

68 Her Majesty's Government in the United Kingdom, "*International Criminal Court Act 2001*", Chapter 17, (2001) www.hmso.gov.uk/acts/acts2001/20010017.htm, 1.

69 Command of Defence Council, Ministry of Defence, "*Manual of Military Law*" 12 edition, (1972) Her Majesty's Stationary Office, London, 156.

Before addressing the standards referenced by the stated national Statutes above, it is only relevant to highlight the legal provisions relating to a defence of superior orders as provided by the 1998 Rome Statute of the International Criminal Court. The main focus is on Article 33 of the Statute, which provide as follows:

> "(1)The fact that a crime within a jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the orders was unlawful; and;
>
> (c) The order was manifestly unlawful.
>
> (2)For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."[70]

In referring to the different provisions made regarding the defence of superior orders, in determining the standards that are imposed by national and international legislation relating to the defence of superior orders, as highlighted, it is evident from the references that certain conditions need to be fulfilled. All of the statutes we have referred to provide similar defences when it comes to the defence of superior orders. In analysing the conditions, three major factors need to be present:

(a) the person must be ordered by a superior or person of authority;

(b) the person must not know the order was unlawful; and

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[70] International Criminal Court, "*Rome Statute of the International Criminal Court*", (2003), New York in http://www.icc-cpi.int/index/php, 1

(c) the order must not manifest itself to be unlawful.

These three conditions seem to be the major factors that need to be fulfilled in successfully arguing a defence of superior orders, and will now be looked at in turn.

2.2.1. Obedience to orders of a superior or person of authority

In any military system, there exists a hierarchy amongst the troops, outlining the different levels of command and authority. For example, in ascending order, a section comprising of ten soldiers is commanded by a section commander who holds the rank of corporal. He is seconded by a section second in command, who holds the rank of lance corporal. Three sections make up a platoon, commanded by a platoon commander, who is usually a lieutenant or second lieutenant. He is seconded by a platoon sergeant. Three platoons make up a company, under the command of a company commander, usually of a rank of major. He is seconded by a company second in command holding the rank of captain. Five companies (including support units) constitute a battalion, under the command of a battalion commander holding the rank of lieutenant colonel. He is seconded by a battalion second in command, holding the rank of major. The hierarchy of military composition and its command goes on and on, until it reaches the executive authority, the commander in chief.

In the issuance of military orders or directives, the channel of command and authority flows through the same structure. Rarely would there be an occasion where a commander would bypass the next person in authority to issue an order. This structure and composition is strongly promoted within the military circle, all designed to maintain

discipline, command and control. The soldiers are trained to follow orders from their immediate superior and that of superior commanders in the unit they serve. Again, a soldier serving in Alpha Company is not expected to follow orders from Bravo Company, because his command and control comes from a particular company.

In relation to the condition of defence of superior orders, a person can only be commanded and ordered by a person who is a superior. For example, a platoon commander cannot be ordered by a section commander to attack a village full of children and women. The section commander does not have command over the platoon commander and is not superior in authority. Similarly, in a section, a simple soldier cannot direct the section and its section commander to attack the village, the soldier has no authority and is not superior in command. Under these circumstances, the obedience to any such orders will not constitute an act arising from a superior order and will not afford any defence under these provisions.

This position of following superior orders may change in certain circumstances, especially when forces are involved in military operation and the likelihood of causalities is imminent. This issue becomes quite relevant when looking at a section, where there are eight ordinary soldiers and two non commissioned officers. What happens if, when assaulting an enemy position, both the section commander and his second in command are killed or injured and they cannot go further? The military operation has to continue, what orders are lawful under these circumstances? As a general rule, the surviving most senior member by years of service takes command. The orders issued by him are deemed

to be that of a superior. As long as there is an acceptance of a person who becomes their superior, compliance with any orders issued by him is required.

Most military operations now involve a coalition of forces operating under a unified organisation, such as the United Nations, Multinational Forces, or the North Atlantic Treaty Organisations. In such partnership, the issue of command and control becomes difficult, especially when two partial units of two different countries combine to form one unit. For example, a mobile patrol consists of ten soldiers each from The United Kingdom and The United States Forces. In such situation, the person, irrespective of the country that is given command, becomes the superior leader and orders issued by that person are obeyed. Usually, through a status of force agreement, these varying positions are recognised, allowing troops to be commanded by foreign commanders.

However, not all countries practise this understanding. From my experience whilst serving with the French Contingent under the United Nations Interim Forces in South Lebanon, although the French troops were placed under the command of another battalion commander, the issuance of orders to them was transmitted to French Headquarters and redirected to their most senior member of the force. This was a standard practice the French had, at times becoming confusing and disruptive. Although the French were operating in an international coalition force, their standing operating procedures were different, especially when it came to command and control of their troops. These practices have changed, becoming more evident during the Gulf War,

where the French operated under the command of The United States and The United Kingdom Forces.

One other feature that has become common in modern day military operations is the presence of civilians or persons associated with other governmental organisations which have some interest or contribution towards the military operation. Most military use intelligence personnel for covert work, and informers and local militia to assist in their military operation. In some cases certain political influence and authority may be present. It is important that the different persons be identified and assessed as to how they fit into a military operation and what specific role they have. As innocent as it may look, the presence of third persons may influence the mission to an extent that issuance of orders may be affected.

For example, in the Abu Ghraib Prison scandal, one of the arguments forwarded was that the soldiers charged for the abuse were following orders from United States intelligence personnel operating separately from the unit.[71] For soldiers, the obedience to an order from a third person may cause a problem, for the simple reason that they do not come under the command and control of such a person. These third persons may have the authority but may lack the right to command and issue orders. An act in compliance to an order by a third person may pose some difficulty and not permit a defence. The position may vary with executive orders which are issued to the higher echelon of the military

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[71] Phillip Carter, "*Superior Orders: Will the defence work for PFC Lynndie England, Who is accused of abusing Abu Ghraib Prisoners*?"(10 Aug, 2004) FindLaws, http://writ.corporate.findlaw.com/commentary/20040810_carter.html., 2.

command. Orders from the commander in chief or the minister of defence may afford some relief, because the senior military commanders come under the authority of such executive directives.

Soldiers must realise that to invoke a defence of obedience to superior orders, the orders issued must come from a person who is in command. The mere fact that an order was issued by someone more senior does not validate the defence. The person issuing the orders must have command and must be superior in authority. Moreover, a person who acts independently and exceeds any orders or instructions may not have the benefit of arguing such a defence.

2.2.2. Person must not know the order was unlawful.

Military effectiveness and the success of a battle is dependant on the obedience by soldiers to orders. Obedience becomes more necessary when the military is involved in situations which are dangerous and could result in heavy causalities. In the military, for the purpose of command and control and to maintain discipline, soldiers from the initial stages of their training are trained to obey orders. In terms of obedience to superior orders, the situation is made complex in that soldiers are trained to believe that all orders issued by their superiors are authorized. Contrary to the belief, we note the numerous instances where obedience to superior orders has been held out to be unlawful.

How then can a soldier know that the orders he has been given is unlawful? There are certain guidelines that have been highlighted that could assist in ones determination. In

the case of *McCall v McDowell*[72] it was held that an order was unlawful "where at first blush it is apparent and palpable to the commonest understanding that the order is illegal". Professor Yoram Dinstein has adopted a different approach in determining whether a soldier knew whether the order was lawful or not. His method is commonly referred to as the "auxiliary test of manifestly illegality" or "manifest illegality principle"[73] Lord Cave in referring to the principle added that it "limits the impunity of the soldier to cases where the orders are not so manifestly illegal that he must or ought to have known that they were unlawful".[74]

Professor Dinstein has stated that the test to determine the illegality of an order is "objective in its character and is based on the intelligence of the reasonable man".[75] Two possibilities arise from this:

> "the first is where a soldier commits an offence following the orders not manifestly illegal from the point of view of a reasonable man. The second is where a soldier committed a criminal act which is manifestly illegal for any reasonable man, but due to his personal inadequate abilities, he himself is not aware of the illegality of his act."[76]

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72 (1867) 13 How 115, 149.

73 Jordan Paust, "*International Criminal Law: Cases and Materials*", (1996), Carolina Academic Press, North Carolina, 119.

74 Lord George Cave, "*War Crimes and Their Punishment*," (1923), Transactions of the Grotius Society, VIII, pp. xix- xxxi, esp. pp. xxii-xxiii.

75 Yoram Dinstein, "*The Defence of 'Obedience to Superior Orders' in International Law*", (1965), A. W. Sijthoff, Leyden, 26.

76 Natalia M Restivo, "Defence of Superior Orders in International Criminal Law as Portrayed in Three Trials: Eichmann, Calley and England", (2006), Cornell Law School in http://lsr.nellco.org/cornell/lps/papers/, 18.

In a hypothetical situation, for example, an order was given that sorties were to be sent to destroy an enemy chemical factory which was alleged to be producing chemical and biological gas likely to be used against civilians and our troops. The information was obtained from covert operations and through informers located in the village where the factory was located. Not known to the pilots who were delivering the arsenal was that the block of houses that were to be taken out were not factories but a residential area housing the families of the top enemy commanders. As a mind game, or as a psychological warfare strategy, the families were targeted, in an attempt to neutralise the constant suicide attacks through the use of car bombs, which were carried out by the enemy. As the sorties were delivered, numerous lives were lost, children, women, and elderly, none who had had an active part in the conflict. Later reports evidenced that the target was not as it was made out to be.

Based on the orders, the pilot would have argued that his mission was legitimate and in accordance with his directive; but what if the pilot had information or intelligence reports that the area targeted was known to be residential and the home of prominent enemy commanders? Furthermore, should the pilot have known that the delivered sortie could cause the death of innocent people? If so, was any strategic action taken to reconfirm the intelligence report and mission orders? Arguably, if there were consorted efforts made to reconfirm and verify likely targets and the possible damages that would occur, in such circumstances, the action of the pilot could be successfully argued, if through all the intelligence it became clear that the information was correct.

The case of sorties being delivered has been highlighted because this is how modern warfare is fought; with ammunition delivered hundreds of kilometers from the actual target, with a higher degree of effect and destruction. In such deliveries, where there is an absence of personal confirmation of the target and what is being targeted, the need for good, reliable and accurate information is vital. The standard demands military operators to be more precise and accurate in their delivery and nomination of targets. The fact that certain grid references were given for the delivery of the ammunition, with the hope of achieving its desired result is not sufficient. The soldiers will be the ones held accountable for their decisions and actions relating to orders.

The standard imposed here in many ways deviates from the normal practices of questioning orders. The old thought of obeying orders as they come is a thing of the past. No longer will soldiers be able to hide behind the veil of obeying orders if the orders were unlawful, and no objections or questions were raised as to the legality of such orders. Where there is doubt as to the legality of the orders, questions should be raised, allowing a fall back position that inquiries had been made about the orders. However, soldiers must be careful when raising objections to an order; the objections have to be honest and have certain merits. An objection cannot be raised to an order for the simple reason of avoiding participation in a military operation; rather the basis should revolve around whether a war crime or crime against humanity will be committed by such acts. Soldiers have to remember that questioning orders is like a two way street. If the order is questioned, soldiers may escape breaches of war crimes or crimes against humanity.

Conversely, lacking merit to the objection may lead to charges of insubordination or the disobedience of lawful orders. [77]

Through this determining factor, in situations where soldiers commit an act not manifestly illegal to a reasonable man, the person himself being not aware of such illegality, he will not be held liable for his actions. However, where a soldier commits a criminal act not manifestly illegal to a reasonable man, however, he himself is fully aware of such illegality, then in such circumstances the person will be held criminally liable.

2.2.3. Order must not manifest itself to be unlawful.

The manifestly unlawful standard relates to the reasoning behind the obedience to superior orders; whether the conduct of an act is acceptable or not. The standard requires that soldiers use their own judgment, conviction and common sense in determining whether the order given is lawful or not. In the *Einsatzgruppen Trial*, the Tribunal in addressing this issue said:

> "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do…. An order to require obedience must relate to military duty…. And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if

[77] Hilaire McCoubrey, "International Humanitarian Law: The Regulation of Armed Conflict", (1990) *International Journal of Refugee Law*, 221.

> the order refers to a military subject it must be one which the superior is authorised under the circumstances to give. The subordinate is bound to obey only the lawful orders of his superior and if he accepts a criminal order and executes it with malice of his own, he may not plead Superior Orders in mitigation of his defence."[78]

Generally it has been accepted that a lawful order can be distinguished from a manifestly unlawful orders, because an order which is demanding a manifestly illegal act will awaken a sense of feeling and cause a unique revulsion within the persons obeying it. Many courts trying soldiers for atrocities have given similar distinctions. In the case of *McCall v McDowell,*[79] the court, in addressing manifestly unlawful orders, distinguished them by saying: "is so palpably atrocious as well as illegal that one ought to instinctively feel that it ought not to be obeyed." Similarly, in the trial Adolf Eichmann, the Israeli Supreme Court distinguished manifestly illegal orders, by saying:

> ""The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the given order, as a warning reading "Prohibited!". Not mere formal illegality, hidden or half-hidden, not the kind of illegality discernible only to the eyes of legal experts, but a flagrant and manifest breach of the law, certain and necessary illegality appearing on the face of the order itself; the clearly criminal character of the order or of the acts ordered, an illegality clearly visible and repulsive to the heart, provided the eye is not blind and the heart is not stony and corrupt - that is the extent of 'manifest illegality' required to release a soldier from

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78 *In re Ohlendorf,* (1948) 15 Ann. Dig., 656, 665 – 668. http://www.einsatzgruppenarchives.com/trials/schubert.html.

79 (1867) 15 F. Cas., 1235, 1241.

> the duty of obedience upon him and make him criminally responsible for his acts."[80]

It is quite apparent that the manifestly illegal standard is measured by what a man of ordinary sense and understanding would have done when confronted with an order to commit certain acts which may have given rise to certain criminal offences. The standard has been lowered to exclude any formal training and expertise the soldier may have, whereby, the conduct of the soldier is determined not as a professional, but rather as any other ordinary person. By excluding the professional character of soldiers, we fail to recognise the uniqueness of a military profession and the adherence of discipline and obedience to orders. The assessment of how a soldier looks at an order on a battlefield, interprets it and acts, varies to the manner in which an ordinary person may address it. For this reason, the decision by the soldier becomes more demanding, especially when deciding whether or not the order is lawful under the existing national and international laws.

From these guidelines a soldier should be able to distinguish an illegal order from the face of it, without seeking legal assistance or forging through pages of law books. In receiving the order, the soldier must be able to make a certain analysis of what the order requires, and what is required of them to do. If the order when issued gives rise to a feeling that it is wrong, in that it involves certain acts that are likely to be atrocious, then as a rule, is should not be obeyed. However, one must be certain of how we determine

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80 *Attorney General of the Government of Israel v. Eichmann*, 36 ILR 5 (District Court of Jerusalem, 1961) aff'd 36 ILR 277, (Supreme Court), 257 – 258, 314 – 315, 318, www.ess.uwe.ac.uk/genocide/Eichmann.htm.

what is right or wrong. A determination based on a moral judgement in a battlefield, a sudden attack of morality that war is wrong and orders to attack the enemy position and kill the enemy is wrong, may not provide relief as a defence of a manifestly illegal order. For an ordinary person, the mere fact of having to go to war, get armed and seek to kill other human being may be wrong, but this may not hold correct for a soldier who has undertaken a duty to perform such roles.[81]

The determination by a soldier of whether or not an order is manifestly illegal has to be reasonable. A soldier cannot plea that an order that was given was manifestly legal when it professed to be illegal, for the simple reason that in his judgement, the order was legal. If acting upon a order given and criminal offences were alleged to have been committed, the determination will be whether or not the given order and the compliance were reasonable. For example, if approaching an enemy position, several enemy soldiers surrender under a white flag. The commander is aware that he has to transport the prisoners to safety and a holding cell. In doing so, the commander realises that the mission will be jeopardised. The success of their advancing force is dependent on the success of their mission. The troops realise that also and know that they cannot be held up by the prisoners and cannot afford to spare soldiers to escort them back. The commander gives the orders that the prisoners be taken care of. The troops take the prisoners out and shoot them.

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81 Mark J. Osiel, "*Obeying Orders: Atrocity, Military Discipline & the Law of War*", (1999) Transaction Publishers, New Brunswick and London, 946 - 975.

For the soldiers, the order to take care of them was an implied directive to shoot them. They thought the order was reasonable, in that the success of their mission and that of their force was paramount. The prisoners were enemies and a few less will not matter, especially when their orders to capture an enemy position were so vital. Under the manifestly illegal standard, the reasonableness of the order is judged on what a person of ordinary sense and understanding would have done. It is commonly understood that a prisoner of war is to be afforded all protection and care possible. The killing of prisoners is illegal, even to the extent where a mission is compromised.

Not all illegal orders will manifest themselves as such, especially when seen through the eyes of a soldier embroiled in fierce battle with the enemy. Until familiar with the norms of combat, people will generally feel completely repulsed at the thought of shooting another human being. However this position changes if the other person is shooting back with the intention to kill. It is likely for this reason that a repulsive feeling may not necessarily foster a sense of unlawfulness. Moreover, acts which are manifestly unlawful, are often not repulsive. As the atomic bomb was dropped over Nagasaki and Hiroshima, people were more fascinated by the mushroom cloud and the evaporating devastation caused.[82]

Even today people are fascinated by a flame thrower that discharges an unimaginable sight, as flame engulfs the bunkered enemy some fifty feet away. As fighters are scrambled and drop napalm bombs across a broad country side, covering the foliage with

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[82] Tim O'Brien "*The Things they Carried*" (1990), Broadway Books, New York, 79 - 88.

a bright distinct colour within seconds, people are fascinated by its sight rather than showing any repulsion towards the result it has. A seeking missile fired from a battle ship carrier brings fascination with smoke and its flight. Cheers ring out at a satellite image of the missile exploding, knocking down a block of houses and smokes billowing. No disgust is registered for the innocent lives or unprecedented destruction caused to property. Such technology today not only dispels any feeling of revulsion but in fact acts as a motivation for soldiers and even the public at large. The repulsiveness of an order then becomes a poor yardstick upon which to determine if an order is manifestly unlawful or not.

However, this does not absolve or allow soldiers to argue that they had no instinctive feeling that the order was unlawful. There are certain acts that would be distinguished as being unlawful. For example, lining up children, women and elderly and directing them to be shot because their sons and daughters are serving with the enemy, is manifestly wrong. Similarly, directing artillery fire on residential dwellings housing a lone sniper, would be manifestly unlawful. To terminate water and cut the food supply to civilian people, with the intention of starving them, would be manifestly unlawful. The lists of acts are unlimited, depending on the interpretation of how an order manifests itself as being lawful or not.

The dilemma faced by soldiers in determining whether or not an order is lawful or not will not be eased by expecting them to rely on their inner conscience in make such determinations. It may assist to some degree but in many cases, their judgement will be

clouded by their professional military upbringing, resulting in decisions which may be illegal, but simply be seen by the soldiers as an extension of their military role and an objective to be accomplished. Every assistance should be given to ease the decision of the soldiers, by improving the order that is issued to them. The following are some suggestions on how to improve and assist soldiers in differentiating between orders which are lawful and unlawful.

2.3. Issuance of orders: guide for commanders.

In the majority of the cases where atrocities are committed when following superior orders, the manner in which the order was issued, its mode of delivery, and the circumstances prevailing at the time of receipt all contribute to the impasse. Generally, as orders are passed down the military hierarchy, the orders often lack specification, allowing commanders to reissue orders, giving them more details and specifications as they are passed down the ranks. For example, a battalion commander may direct Company Alpha to capture Hill Gold by 1000 hours the next morning. The company commander of Alpha Company will go and reissue orders detailing what his four platoons will do. The mission of the platoons may be the same, but their tasking different. Platoon One may be directed to capture the right of Hill Gold, Platoon Two, the left of Hill Gold, and Platoon Three, the centre of Hill Gold. Platoon Four may act as the support group providing fire support for the advancing platoons. The platoon commanders, when issuing orders, will direct their respective sections to their tasks relative to the area they are required to capture.

In situations where soldiers are operating under adverse conditions, the varying tasking is made difficult. Operating in unfamiliar terrain, adverse weather conditions, deprived of sleep, rest and food, having lost comrades, or operating with a lack of resupply of rations, ammunition, medicine and replacement of troops greatly affect the ability of soldiers not only to fight but also to receive orders. Despite such adversity, a lot of atrocities and criminal acts can be avoided by the manner in which orders are issued by commanders.[83] The following are some ways in which this communication can improve and thereby assist soldiers in better identifying and knowing which orders are lawful or not and whether the same should be obeyed.

2.3.1. Orders to be clear and precise.

In most armed forces, orders are issued in a distinct format, with explanations on the ground, situation, mission, execution, administration and logistics, and command and control. This sequence is mostly followed to bring order and conformity to the understanding and appreciation of the battle plan. In the issuance of orders, I am suggesting that details should be clear and precise. Ambiguity on details should be eliminated, and where they exist, the soldiers are to be advised accordingly.[84] For example, if there is insufficient intelligence on whether an enemy village has children, women and elders who are not involved in the conflict, then the soldiers are to be told, rather than a statement made that the village houses enemies.

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83 Mark J. Osiel, "*Obeying Orders: Atrocity, Military Discipline & the Law of War*", (1999) Transaction Publishers, New Brunswick and London, 946 - 975.

84 Gwynne Dyer, "War", (1985) Crown Publishers Inc., New York, 136-139.

Secondly, ambiguity involving what should and what should not be done must be eliminated. A commander must ensure that his orders involve precise directives involving acts which are forbidden. Soldiers must be told not to kill or injure children, women or elders who do not carry arms. There is to be no rape or looting from the people. Genocide or crimes against humanity are forbidden. Again, in the example of the village, orders by the commander should say that the children, women and elders are not to be injured or killed. If they are armed, then they are to be treated like any other enemy. There are not to be harmed and all protection afforded. No animals are to be killed, water wells are not to be contaminated, and no houses burnt or destroyed. However, the bridge leading to the village from the north is to be destroyed because it is a supply route for arms and ammunition for the enemy.

If the orders are precise, not only in details but the reasons behind such a mission, then soldiers will be in a better position to decide whether to follow the orders or not.[85] For example, in a hypothetical situation, if orders were issued that a company was to destroy a village without any reason given, it becomes difficult for soldiers to decide whether to act or not. However, the same orders could be given and it could be explained that the village was to be destroyed because the son and daughters were serving with the enemy; that they were planting rice which was later sold in the market and ended up on the plates of the enemy soldiers and leaders planning and executing the war; and that the villagers had built the bridge that was used by the enemy to carry food, water, ammunition and medicine. If it was decided that all children, men and women were to be killed so there

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[85] Guenter Lewy, "*America in Vietnam*", (1981) Oxford University Press, New York, 359 – 361.

would be no support for the enemies, then a soldier in hearing the reasons relating to the mission would be in a better position to make the decision to follow such orders or not.

2.3.2. Orders to have full intelligence.

Intelligence is vital for any military operation. It not only provides information about the enemy, but at the same time allows battle plans to be prepared. One of the problems that military commanders encounter is the lack of intelligence that is passed down the military hierarchy. Unfortunately, it is usually when the troops have started on a mission or have completed it that it is found that not all information was given regarding the intelligence, disposition of the enemy, friendly forces in the area, and children, women and elders present.[86]

The availability of accurate intelligence allows commanders and soldiers to plan and execute their orders in a organised manner without fear of encountering obstacles or situations that may give rise to criminal acts. The provision of information eliminates surprises and allows commanders to factor into their orders contingencies when encountered with a situation. For example, if an intelligence report has stated that a camp houses only enemy soldiers and sympathisers, the commander can issue his orders accordingly. However, if during the assault, it is discovered that the camp is occupied by children, women and elders, the situation completely changes. The soldiers have to decide whether to continue with the assault and occupation of the camp, or to abort the mission. Also, if at the first sight of troops, shots are fired from inside the camp and the

[86] Martin van Creveld, "*Command in War*", (1985) Harvard University Press, Cambridge, Massachusetts and London, 233 – 275.

children, women and elders have adopted an all round defence of the camp armed with sticks and gardening tools, this again alters the position of what soldiers are to do.

Suppose that, in complying with the orders to take over the camp, the soldiers continued with their military operation and occupied the camp. Most of the occupants were killed and a few seriously injured. There were no enemy soldiers found in the camp. The shots fired were by an elderly farmer using a hunting rifle. It was later discovered that the battalion headquarters knew that the camp housed children, women and elders and that in previous patrols and encounters, a similar position and defence had been displayed by the occupants of the camp. This situation may have been avoided if all information was given to the patrol commander when planning and issuing his orders. He could have tailored his orders to reflect contingencies for incidents that might be encountered. The intelligence may have avoided unnecessary killing and the possible criminal charges for the killing of children, women and elders.

Accurate intelligence may not be available all the time. Such is understandable but in today's military age, by using satellite, covert operations and informers and through intelligence gathering itself, there should be ample data and information available for a mission.[87] This new technology can be effectively used to better educate and inform soldiers of the mission and what it entails. For example, during the gulf war intelligence was successful in determining targets and the best suited weapons to engage them. Weeks of planning and intelligence enabled the destruction of a bridge leading into Baghdad

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87 William G. Eckhardt, "Command Criminal Responsibility: A plea for a Workable Standard", (Summer, 1982) 97 *Military Law Review*, 1 – 32.

City. The bridge was destroyed as the last person successfully crossed onto the other side,[88] which was a credit to pre planning and the intelligence available when decisions regarding the target were made. The same bridge could have been blown up a couple of hours earlier, with the likely casualties in the thousands.

Accurate and readily available intelligence will greatly assist soldiers in their decisions when engaged in a military operation. The information will provide them with the opportunity to better evaluate and assess different situations. Better intelligence will also allow commanders to plan contingencies and give specific directions regarding likely situations.

2.3.3. Questioning orders.

Although it has been argued by many military scholars that military orders cannot be questioned, this is a myth. All armed forces allow orders to be questioned, provided that such questions relate to the possibility of eliminating criminal acts or atrocities being committed when complying with orders. Earlier, the conventional format that is adopted by armed forces in issuing orders was stated. One of the last things that the commander asks after issuing the orders is whether there are any questions relating to the orders. The opportunity is designed to allow soldiers to question any part of the orders and seek clarification on any matter which is of concern.

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88 John Hockenberry, “Alfred Eisenstaedt Photography Awards”, (2000) in http://www.life.com/Life/eisies/eisies2000/hockenberry2.html.

Commanders at all level should allow for constructive questioning of orders, especially where an order lacks specification and intelligence. Questioning should not be seen as a derogation of command and control, but rather as an opportunity for soldiers to have confidence in their commander, their army and their country by being given the opportunity to be part of the plan.[89] This approach will take away the master - servant relationship and foster a partnership in the accomplishment of missions. A better understanding of the situation can be gained by questions and discussions and perhaps alternate ideas better suited for the mission could be forwarded.[90]

Soldiers when asking questions to seek clarification should be allowed to ask for written confirmation of the order, especially if gross violations of humanitarian law and atrocities seem to be present. In most situations, further clarification and written confirmation would make the commander reassess the orders and make appropriate changes. For example, if an order was given 'to take care of prisoners of war', clarification should be sought as to what was meant by 'take care of the prisoners of war'. If the reply, 'take them out in the jungle and shoot them' was received, then confirmation of the order in writing should be asked for. When the order is received in writing, the soldier then has the opportunity to decide whether he should follow the order, or refuse on the basis it was illegal.

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89 Jacob G. Hornberger, "Obedience to Orders", (2003), *The Future of Freedom Foundation* in http://www.fff.org/comment/com0304a.asp, 4 – 23.

90 Mark J. Osiel, "*Obeying Orders: Atrocity, Military Discipline & the Law of War*", (1999) Transaction Publishers, New Brunswick and London, 1104 – 1111.

When seeking confirmation of orders, a soldier's intention must be related to the order and not driven by a sudden moral attack against the military campaign. This opportunity to ask questions and seek confirmation should not be seen as an opportunity to thwart the advance or disrupt the mission. Rather, the opportunity should be constructively utilised for determining the legality or illegality of the orders and the need for compliance. The opportunity to ask questions and seek confirmation would undoubtedly eliminate a lot of doubts soldiers may have regarding orders. They would have the opportunity to evaluate, assess, and then decide whether the orders are lawful or not and whether they should comply or refuse.

2.3.4. Adopting specific rules of engagement.

In any military operation, the conduct of commanders and soldiers in their use of weapons is regulated by the rules of engagement present. The rules of engagement are orders issued by the forces that articulate the situation, conditions, degree, manner and limitations of the force to be used with the aim of successfully achieving or fulfilling the mission. The rules of engagement specifically detail the extent to which a soldier is allowed to engage the enemy and when to refrain from doing so. Rules of engagement are not mere guidelines, rather lawful orders of the parameters in which soldiers are to conduct themselves.[91]

Comprehensive and detailed rules of engagement will not only restrict commanders from issuing unlawful orders, but soldiers receiving such orders will be able to differentiate the

[91] Mark S. Martins, "Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering", (Winter, 1994) *143 Military Law Review*, 1 – 158.

orders and be able to gauge whether they are lawful or not. If formulated properly, soldiers will be able to make reference to the rules of engagement and successfully argue the illegality of such orders and avoid situations likely to draw criminal repercussions. Most armed forces have seen the benefits of having detailed and well formulated rules of engagement. Forces have gone to the extent of printing pocket sized rules of engagement for soldiers. In the Fijian army, pocket sized rules of engagement have been classified as part of the battle gear. The rules of engagement are seen as an added tool to assist both the commander and soldiers in their decision making; and assist in demarcating the parameters of conduct.

I have witnessed first hand the effectiveness of rules of engagement and their effect in controlling the conduct of soldiers and allowing them to decide whether or not to use force as ordered by their superior. An incident which I witnessed in South Lebanon in 1986 whilst serving with the United Nations Interim Forces in South Lebanon illustrates this point. We proceeded on a routine foot patrol which was to take us through the refugee camp of *Rashdiya* overlooking the city of Tyre. Approaching the camp, we were confronted by a group of militia, heavily armed. In accordance with the United Nations Resolution, we asked the militia to move out of the security area, as no weapons were allowed in.

After tense negotiation, the militia agreed to withdraw. As they retreated, having reached fifty meters, they opened fired on us. A few soldiers were hit. The order was then given to adopt a defensive position, with no orders to shoot. We then yelled that if they, the

militia did not stop firing, we would fire back. As firing continued, we received orders from the Headquarters to fully engage the militia. The order was ignored; and in turn the order was given to fire warning shots. The militia continued firing. Orders were then given to shoot around the edge of the militia. The militia continued firing, with no sign of easing. Orders were then given to shoot the group leader. One shot was fired; suddenly all firing ceased. We heard calls for no more firing. The militia came out with hands raised and weapons lowered.

In complying with the rules of engagement, the commander had refused to adhere to the orders to fully engage the militia. It was known that this order was contrary to the rules and the spirit of the United Nations mission. Soldiers were injured, but adherence to the rules of engagement was paramount. Adherence to the rules did not only protect and limit our response to the situation but also prevented the situation from escalating further. Similarly, a comprehensive list of rules of engagement will limit the conduct of commanders and soldiers and at the same time assist them in determining whether an order to act is lawful or not, based on the rules provided.

2.3.5. Training soldiers on the law of war.

The development of international humanitarian law has become more soldier orientated, requiring soldiers to be more accountable and at the same time cognisant of the existence of rules relating to warfare. The field commanders and soldiers should be placed in the driver’s seat and given the responsibility for such rules. The long dispute or argument that the laws of war are for lawyers, needs to be deemphasised. One way in which we can

reduce obedience to superior orders that are unlawful is by allowing soldiers to become custodians of the laws that govern their conduct. The survival of civilization depends on the practical application of international humanitarian law by soldiers. Like lawyers and advocates of the laws of war, soldiers need to talk, discuss, critique and experience the existence and application of such laws.[92] The only way all this can be achieved is through formal training of soldiers in international humanitarian law.

An understanding of the law of war will enable soldiers to distinguish between war and peace and the conduct that is forbidden. Once the soldiers understand what the parameters in which they can conduct themselves are, they will develop the ability to identify an order that goes beyond legal bounds. Like all military skills, the ability to differentiate a lawful order and an unlawful one can only be achieved through training and education. Training cannot be confined to the rules provided in conventions, charters or manuals. It has to be taken a step further by adopting simulations and field exercises. A hands on approach gives soldiers a real feeling of what they will encounter in their day to day operations.

In recent times, many armed forces have established institutes that are specifically responsible for the dissemination of international humanitarian law. Not only are the texts on the laws of war debated, but a lot of emphasis is put on preparing national manuals, cards and videos for the purpose of assisting soldiers in this field. Such initiatives are

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92 W. Hays Parks, "Rolling Thunder and the Laws of War,", (January, 1982) 33 *Air University Review*, 2-23.

commendable, but with one reservation.[93] In many armed forces, the basic training of soldiers is based on conventional warfare, the ability to fight and win in war. However in today's conflicts, the missions undertaken are not purely conventional wars but rather a mixture of peace enforcement, peacemaking and peacekeeping, of the type during the last major conflicts in Africa, The Balkans and The Middle East.

The ability to change the *modus operandi* of a soldier in a limited time can become a factor which may cause difficulties in distinguishing orders. If the soldier has been trained all his life on the concept of conventional warfare, and suddenly he is required to take up a peace mission, there will be conflict in roles and the way they are executed. The need to train soldiers becomes more demanding, with greater emphasis to be placed on what they can and can not do. If their roles are not clearly distinguished, it not only risk breaches of international humanitarian law, but also will put the soldier in confusion, which could be detrimental to him and his comrades.

In Somalia, The Canadian Armed Forces encountered such problems when confronted with angry local mobs loyal to Farad Aided. On Being trained in conventional warfare and suddenly drawn into a conflict with the basic aim of peacekeeping, the Forces were at times reluctant to engage the local militia, simply because their training had not prepared them for such situations. Also there was fear that any armed engagement and subsequent death would result in enquiries and possible criminal repercussions. The inability of the

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93 W. Hayes Parks, "Righting the Rules of Engagement," (May, 1989) *U.S. Naval Institute Proceedings*, vol. 115, no. 5, 11 – 84.

soldiers to clearly understand their roles, and what to do when orders were given to engage the crowd, led to heavy losses amongst the Canadian and the Pakistani troops.

Training of soldiers on the laws of war would undoubtedly assist them in differentiating lawful from unlawful orders. They would be able to evaluate and determine whether or not orders to perform a particular act are in violation of the rules, and what action if any is to be taken regarding the same. Not all circumstances can be predicted on a battle field; however, more simulations and field exercises should equip the soldiers with enough knowledge to identify an order as lawful or unlawful. To enable soldiers to be able to think and evaluate orders, they must be made custodians of international humanitarian law. The reliance on lawyers to interpret and decide for soldiers should be taken away. The responsibility should become that of the commanders and soldiers.

2.4. Conclusion.

As armed conflicts around the world become more sophisticated and the use of modern technology is becoming ever apparent, one factor that will remain unchanged is the need for more soldiers on the battlefield. Engagements on battlefield will vary with the type of military operation. Be it peace enforcement, peace making or peace keeping, soldiers will carry with them their own military professionalism. Missions will be undertaken with the realisation of their commitment to the nation, army and their own self identity. Honour will become the focal point of many operations with the reluctance by soldiers to undermine their role and objectives, especially when honour is in question. Atrocities,

war crimes and crimes against humanity will result if soldiers are not trained and educated properly in distinguishing lawful from unlawful orders.

The defence of superior orders has attracted a strict application, allowing a defence for acts where the order issued was from a responsible superior, the soldier did not know that the order was unlawful and the order was manifestly unlawful. Undoubtedly, a defence of superior orders exists, with the exception of any acts resulting in the commission of genocide or crimes against humanity. Unlike the Nuremberg and Tokyo trials, and the current provisions from the Tribunal of the Former Yugoslavia and Rwanda, there is international and local recognition for the defence of superior orders.

The concern that arises from all this is that the development of international humanitarian laws and the recognition for a defence of superior orders will be to no avail unless efforts are made to minimise the orders being interpreted in ways that are unlawful and in breach of international standards of practice. There is a greater demand for orders to be more clear and precise in their scope. Soldiers need to be given more and better intelligence relating to their objective and mission. Soldiers have to draw away from the old thoughts that superior orders cannot be questioned. They have to learn to question orders and seek written clarification on orders which seem likely to constitute criminal acts. A handy tool for soldiers that will eliminate doubts and assist in identifying lawful and unlawful orders is the provision of coherent and specific rules of engagement. Like any other skills, soldiers need to be trained and educated on the laws of war and the ability to recognise and differentiate lawful from unlawful orders.

CHAPTER 3

WAR CRIMES AND THE DEFENCE OF SUPERIOR ORDERS.

Kenneth Jarecke, "*This is War*", (2003) in http://www.thememoryhole.org/war/thisiswar, 1

> "The principle of personnel liability is a necessary as well as a logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare. Of course, the idea that a state any more than a corporation commits crime is a fiction. Crimes are always committed only by persons."[94]

3.1. Introduction.

'I was only following orders', are words so often heard today in varying circumstances,

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[94] Arieh J Kochavi, "*Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*", (1998), The University of North Carolina Press, Chapel Hill, 132.

and are their own travesties.[95] The legal, moral, and personal implications of those words have become the focal point in soldiers' wartime conduct, as well as being their appeal for understanding and absolution. This is the common plea mouthed by both the relatively innocent junior soldier and the battlefield killers.

A soldier obeys illegal orders, thinking them to be lawful. Does the law ever excuse a soldier when he acts in the fog of a battle or military operation, a peacekeeping or peace enforcement mission, or a humanitarian intervention?

To a certain extent, obedience to orders can be viewed as a legitimate legal defence in international and municipal law and the military codes of most states. There is a general acceptance that where there has been obedience to orders, a soldier is excused from criminal liability for the obedience to such illegal orders, unless it was so obvious that such orders were in breach of law and regulations.[96]

The idea of holding soldiers responsible for their actions in warfare developed together with that of humanitarian law. The first accounts of such practice could be traced to the military laws of ancient Rome. As early as 113 B.C., the defence of superior orders was raised:

> "Similarly, though he who follows superior orders commonly acts from error, this is not inevitable. ...It is a mistake of law: they know the facts but misread their

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95 Gary A Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums", (2000) 15 *American University International Law Review*, Washington, 481.

96 Ibid.

> duties. The decision of Orestes at least springs from those impressive deliberations which make an offence fall in the category of *Uberzeugungsverbrechen*, crime from conviction, conscientious crime. Incidentally where superior orders are flouted, ... the attitude is nearly always based on conviction and must constitute an *Uberzeugungsverbrechen* in the eyes of the giver of the order. However, error is not essential. Ismene thinks he must yield to the king no matter what he commands. But even if he yields from sheer terror, it would remain a case of superior orders. Whether a case is to be treated as superior orders if there is neither any belief in a duty nor the slightest duress may be left open."[97]

The law of holding soldiers responsible has been maintained through the Middle Ages and has endured in numerous forms to this day.

In the Seventeenth Century, Grotius wrote: "if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out."[98] However, there was legislation put into effect by states that promoted other concerns as to the obedience of a lawful command. For example, the British

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97 David Daube, "*The Defence of Superior Orders in Roman Law*", (1956) The Clarendon Press, Oxford, 7. The Roman stance of excluding acts of "heinous enormity" from the due obedience defence is being used as a yard stick even today when discussing and deciding on issues concerning defence of superior orders. For example, Justice Enrique Santiago Petracchi in his dissent to the Argentine Supreme Court's judgment upholding the due obedience statute of 1987, suggested the continued relevance of such ancient sources to contemporary discussion on the subject. (Dawson, D. "Argentina: Supreme Court Decision on the Due Obedience Law", (1995) 3 *Transitional Justice*, 509, 512 - 514.)

98 Hugo Grotius, "*De Jure Belli ac Paris Libri Tres*" [The Law of War and Peace], Francis W Kelsey trans., Bk II, (1925) Bobbs-Merrill, Indianapolis, New York, 138.

Military Code of 1715, which was used as the platform for the first United States military laws, provided that refusal to obey a military order was a capital offence, regardless of whether the command was lawful or not.[99] The practices in early municipal and state courts in America had similar reactions. The courts rejected the defence of superior orders and held a subordinate responsible for acting on illegal orders without regard for whether the order appeared to the subordinate to be legal.[100] In 1813, in a civil case involving an American privateer, the court used a civilian standard that was applied over time: "obedience to a superior's order is not a legitimate defence if the subordinate knew or should have known the order to be illegal'.[101]

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99 Hersch Lauterpacht, "*The Law of Nations and Punishment of War Crimes*", (1944) *21 British Yearbook of International Law*, 58 - 71. The capital punishment existed without reference to the lawfulness of the command. I must state that the British Courts had first hand experience on these matters well before the 1715 Code where such practices were prevalent; for example, in 1708, Captain Axtell, a guard commander at the execution of King Charles I, unsuccessfully raised obedience to superior orders as his defence. The court held:
"[The captain] justified all that he did as a soldier, by the command of his superior officer, whom he must obey or die. It was ... no excuse, for his superior was a traitor ...and where the command is traitorous, there the obedience to that command is also traitorous." *(A Report of Divers Cases in Plea to the Crown*, (1708) 84 Eng. Rep. 1055.)
The current Army Act of 1955 has similar provisions (s 34 - Disobedience to Lawful Command); however, the person being commanded has a right to refuse an order where it is seen to be unlawful. The Act goes further in identifying a lawful command as one where the "command must not be contrary to English or international law and must be justified by military law". (Ministry of Defence (Army), "*Manual of Military Law*", (1955) The Judge Advocate General Services, Ministry of Defence (Army), Berkley Square, London, 296.)

100 *United States v Bright*, (1809) 24 F. Cas., 1232 - 1234. The case concerned a state militia commander who acted under orders of a state governor to prevent a United States Marshall from executing a federal decree.

101 *United States v Jones*, (1813) 26 F. Cas., 653 - 654. The case concerned a first lieutenant of a United States privateer accused of committing acts of piracy on orders of his superior.

3.1.1. Recognising the Defence of Superior Orders

It was not until 1799 that there was recognition of a defence plea of a defence of superior orders under international law. The first case where the defence of superior orders was argued concerned a American Naval Captain by the name of George Little. Captain Little had seized a Danish ship "Flying Fish" during the United States war with France.[102] It was alleged that Captain Little seized the ship "pursuant to, but without conforming to",[103] the federal laws of seizure in America at the time. However, in conducting the seizure, Captain Little argued that he complied with President John Adam's written instruction, which provided as to how United States naval commanders should exercise the law.[104]

The relief for damages sought by the Danish Owner was refused at trial, but was successful on appeal. Chief Justice John Marshall of the Supreme Court held that whilst naval commanders were obeying the presidential instructions, "such acts of compliance was at their own peril and were liable for damages."[105] [sic] The court went on to say that since the law did not recognise the instructions, any compliance will hold the person exercising such an instruction responsible.[106] What the court was saying was that if the instruction (order) was illegal, the subordinate had the choice to not obey it. If however,

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102 *Little v Barreme*, (1804) 6 Cranch, 170.

103 Ibid.

104 Ibid at 177 - 178. It was argued that was that the act of Congress had permitted the seizure and forfeiture of the ships bound to any port in France, but as was in this case, the President's instructions erroneously did not authorise the seizure of vessels bound to and from France.

105 Ibid.

106 Ibid at 170, 178. The Court held that the presidential instructions " cannot ... legalise an act which without these instructions would have been a plain trespass."

the subordinate chose to obey, then he was responsible for not “recognising its illegality”.[107]

Despite the outcome of Captain Little’s case, obedience to superior orders continued to be argued as a defence. In 1813, First Lieutenant John Jones was charged for assault and theft on board a captured ship. He raised a defence that he was acting upon his captain’s orders. The judge in instructing the jury said:

> “No military or civil officer can command an inferior to violate the laws of his country, nor will such command excuse, much less justify the act ... the participation of the inferior officer, in an act he knows, or ought to know to be illegal, will not be excused by the order of his superior.”[108]

The jury returned a verdict of not guilty. However, we cannot be certain whether the acquittal was based on the defence of superior orders or that of a mistaken identity, which at the time of the trial seemed to be the strongest defence. Although there was an acquittal in this case, it is important to note that like Captain Little’s case, the decision of *United States v Jones* in terms of obedience to superior orders were consistent with the earlier ruling. The standards applicable were made clearer in that: "an officer, military or civil, is liable for those orders that he knows, or should know, to be illegal."[109]

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107 *Little v Barreme*, (1804) 6 Cranch, 170, 179. This judgment had left a heavy burden upon the seamen and soldiers as to which orders were lawful and which were not, especially considering the fact that most service persons at the time had no formal education.

108 *United States v Jones*, (1813) 26 F. Cas., 657 - 658.

109 Ibid at 658.

The decisions in *Little v Barreme* and *United States v Jones* only complicated the position of seaman and soldiers. Based on the decision, they were now made liable for an illegal act carried out on orders from a superior officer. Also, they were equally liable if they did not carry out the orders.[110] The onus was shifted on service persons to make determination as to when or not to follow orders. As such, although a defence of superior orders existed, it could not be invoked as a justification. As summed up quite succinctly in his decision in *Mitchell v Harmony,*[111] Chief Justice Roger Taney said: "superior's order may be palliate, but it cannot justify."[112] As this dictum suggests: a plea of following superior's orders may lead to a lesser punishment, but it does not excuse the subordinate's behavior.

The position of the British to that of the Americans concerning the plea of superior orders as a defence had been the same. For example, a young British ensign who, following orders from his superior, killed a French prisoner during the Napoleonic war. The Scottish Court rejected the plea of defence of superior orders. The court held:

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110 In the case of *Wilkes v Dinsman,* (1849) 7 How., 88, 91 - 92, Private Samuel Dinsman, a marine on USS Vincennes was charged with disobeying the orders of the ship's captain and consequently received twenty - four lashes and was confined in punishment. In approving the punishment, the Supreme Court emphasised the authority of military officers and that of subordinates like Private Dinsman questioning the orders issued by those vested with authority:
"An officer's position ... in many respects, become quasi judicial.... Especially it is proper, not only that a public officer, situated like the defendant, be vested with a wide discretion, but be upheld in it.... It is not enough to show he committed an error of judgment, but it must have been a malicious and willful error."

111 (1851) 13 How., 115.

112 Ibid at 117.

> "If an officer were to command a soldier to go out to the street and kill you and me, he would not be bound to obey. It must be a legal order ... every officer has discretion to disobey orders against the known laws of the land."[113]

The British problem was similar to those of the Americans; the conflicting position of following illegal orders and subjecting oneself to charges, or not following orders and possibly be charged for disobeying a lawful command became a complicated issue, not only towards the military operations but also in maintaining discipline. It was seen by seamen and soldiers, that whatever their position was concerning obedience or disobedience to orders, at the end they were the ones held liable and left to pay the penalty.

3.1.2. The Development of International Humanitarian Law and New Standards of the Superior Orders Defence.

The turn of the twentieth century, not only saw the increased use of obedience to orders as a defence, but more importantly, there was an increase in the codification of the humanitarian law which addressed the issues. The concept of a defence of superior orders no longer remained a matter for Europe; its effect was spreading to as far north as Africa and other occupied territories. For example, in South Africa[114], in the case of *Regina v Smith*,[115] the courts reached similar conclusions as earlier British and American courts. The court held:

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113 Alan M Wilner, "*Superior Orders as a Defence to Violations of International Criminal Law*", (1966) 26 *Maryland Law Review*, 127 - 130.

114 The influence of the British legal system extended to Europe and the African nations with the British colonization.

115 (1900) 17 Special Courts Reports of Good Hope (South Africa), 56.

> "If a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known they were unlawful, the soldiers would be protected by the orders of his superiors."[116]

The standard of determining the guilt or innocence based on the defence of superior orders remained fixed for a while, commanders were held to be criminally liable for the issuance or execution of orders he knew, or should have known to be illegal. The subordinates, on the other hand were held not to be responsible for illegal orders they carried out, provided the "illegality"[117] of those orders was not clear.

The late nineteenth and early twentieth centuries saw the increased codification of humanitarian law, and the origin of the Conventions of 1899 and 1907.[118] At that time

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116 Ibid at 174.

117 There was mounting confusion as to what "clear illegality" meant. Two appellate opinions referred it to mean: illegal orders as those whose illegality was "apparent and palpable to the commonest understanding", (*In re Fair* (1900) 100 F., 155.) The court held that the order directing the accused to kill an escaping military prisoner was not palpably illegal, thus the state lacked criminal jurisdiction); and "so plain as not to admit of a reasonable doubt." (*Commonwealth ex rel. Wadsworth v Shortall*, (1903) 55 A. 952, 956.)

118 International Committee of the Red Cross, "*Additional Articles Relating to the Condition of the Wounded in War*" (20 Oct., 1868) International Committee of the Red Cross Publication, Geneva, 1; International Committee of the Red Cross, "*Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 Aug., 1864*" (signed at the Hague) (29 Jul., 1899) International Committee of the Red Cross Publication, Geneva, 1; International Committee of the Red Cross, "*Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*" (6 Jul., 1906) International Committee of the Red Cross Publication, Geneva, 1; International Committee of the Red Cross, "*Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*" (signed at the Hague) (18 Oct., 1907) International Committee of the Red Cross Publication, Geneva, 1; International

when there was concerted effort made at regulating warfare, efforts were also directed towards making available provisions for a defence of superior orders. In 1906, arguments were raised by Lassa Oppenheim that obedience to superior orders constituted a complete and absolute defence to criminal prosecution. He reasoned, that:

> "If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy.... In case members of forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible...."[119]

Committee of the Red Cross, "*Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*" (22 Aug., 1864) International Committee of the Red Cross Publication, Geneva, II, 1; International Committee of the Red Cross, "*Final Act of the Diplomatic Conference 1929*" (27 Jul., 1929) International Committee of the Red Cross Publication, Geneva, 5;; International Committee of the Red Cross, "*Geneva Convention for Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*" (12 Aug., 1949) International Committee of the Red Cross Publication, Geneva, 155 – 156; International Committee of the Red Cross, "*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*" (12 Aug., 1949) International Committee of the Red Cross Publication, Geneva, 23; International Committee of the Red Cross, "*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*" (12 Aug., 1949) International Committee of the Red Cross Publication, Geneva, 55 – 57; International Committee of the Red Cross, "*Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*" (12 Aug., 1949) International Committee of the Red Cross Publication, Geneva, 78; International Committee of the Red Cross, "*Protocols Additional to the Geneva Conventions of 12 August 1949*", (8 Jun., 1977) International Committee of the Red Cross Publication, Geneva, 65 – 66; International Committee of the Red Cross, "*Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*", (10 Jun., 1977) International Committee of the Red Cross Publication, Geneva, 1

119 Lassa Oppenheim, "*International Law: A Treastie*", (1906) 264 - 265. By linking this interpretation, a traditional concept of international law to that of obedience to orders "with respondeat superior and its related Act of State Doctrine, Oppenheim was able to bring about changes to the soldiers obedience defence. His handbook in 1914 on rules of land warfare incorporates these dicta, holding,

This new approach to defence to superior orders was taken up soon after by the United States. The American *Lieber's Orders 100*[120] was revised, and a new Rules of Land Warfare was adopted which provided:

> "Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanctions of their government or commanders. The commanders ordering the commission as such acts ... may be punished by the belligerent into whose hands they may fall."[121]

This paragraph had revolutionised the standards of a criminal defence of superior orders, making a subordinate obedience to orders a complete legal defence.[122]

"for subordinates, obedience to orders constituted a complete defence to violations of the law of war."

120 The Lieber Orders (commonly called the Lieber's Code) which had been written by Francis Lieber on the direction of President Abraham Lincoln is regarded as first general codification on the law of war. Despite its extensive coverage, the Lieber Code is silent on whether obedience to superior orders could validate a breach of the laws of war. Attached as Appendix 3 the Lieber Code of 1863.

121 Donald A Wells, "*The Law of Land Warfare: A Guide to the U.S. Army Manuals*, (1992) Greenwood Publishing Group, Connecticut, 8.

122 One important point to note is that whilst most of Europe was affording 'better defence' opportunities for its soldiers in respect of obedience to superior orders, Germany, who will be the focus of the international community for the better part of the twentieth century, had different opinions as to the defence of superior orders. The German courts punished subordinates if they executed an order knowing that it "related to an act which obviously aimed at a crime." These standards were used as a basis for the prosecution of German war Criminals after the Second World War. The case of *United States v Ohlendorf* [1947] U.S. Military Tribunal, TWC IV, Nuremberg, 471, is one of the many cases where their own standards were used.

3.1.3. The First World War: Invoking the Defence of Superior Orders.

During the First World War, the Allies debated whether or not the Germans who had violated the humanitarian law should be held responsible for their actions, and whether or not they could rely on the defence of superior orders. There were conflicting views as to what position should be taken concerning the matter, especially when among the Allied ranks, there were strong opinions that combatants should be permitted to rely on the defence of superior orders.

For example, Commander Sir Graham Bower of the Royal Navy argued in 1915 that submarine officers and crews sinking merchant ships should not be held responsible: "the blame does not rest with them, but with their superiors."[123] In Bower's opinion, the military could not function and wars could not be fought under circumstances in which:

> "every subordinate ... was permitted or required to constitute himself a judge of the legality or morality of the orders received from his superiors.... To make him responsible ... would strike at the foundations of discipline in every army or navy in the world."[124]

The major concerns were that the soldiers were ill trained and lacked intellectual ability to "evaluate the context of a command".[125] The fear was that the orders given by commanders may be illegal, when in fact they may seem legally acceptable.[126] Also,

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123 G Bower, "*The Law of War: Prisoners of War and Reprisals*", (1916) 1 Transactional Grotius Society, 15, 24.

124 Ibid at 25.

125 Ibid at 24

126 Sir Bower argued that there may be situations where an officer may possess knowledge which is not available to a subordinate. A merchant ship may be

extended criminal culpability would condemn soldiers to the conflicting commands of domestic and international law. In these situations, there is the possibility of combatants who lack criminal intent being punished; whilst, on the other hand, a maliciously motivated soldier might rely on the defence.[127] Sir Bower's thoughts seem to be consistent with the American and British military manuals, which afforded protection of subordinates from liability.

However, there were other scholars who argued that the British and American principles as to the defence of superior orders were contrary to the spirit of the humanitarian law of war. Arguments were raised by persons like Hugh Bellot, who was of the opinion that "responsibility for illegal acts would be shifted up the military hierarchy"[128] until and only if the head of state remained politically and legally liable.[129] The view expressed by Bellot was consistent with that of many other scholars who did not support the provisions of the military manuals. The concern of Bellot and his colleagues are best summarised in the following paragraph:

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transporting military troops or ammunitions. He noted that the *Naval Discipline Act of 1866* imposed a death penalty for a failure to carry out superior orders.
"when any action or any service is commanded, every person subject to this Act who shall presume to delay or discourage the said action or service upon any pretence whatsoever, or in the presence or vicinity of the enemy shall desert his post or sleep upon his watch, shall suffer death or such other punishment as in hereafter mentioned."
(s 4 of the Naval Discipline Act of 1866 in Ministry of Defence (Army), "*Manual of Military Law*", (1955) The Judge Advocate General Services, Ministry of Defence (Army), Berkley Square, London, 31, 903.

127 Garner James W, "Punishment of Offenders Against the Laws and Customs of War", (1920) *14 American Journal of International Law*, 70, 80 - 85.

128 Hugh H L Bellot, "War Crimes: Their Prevention and Punishment", (1917) *II Transactions Grotius Society*, 31.

129 Ibid at 46.

> "Upon what ground are the members of the enemy naval and military forces to be exempted from punishment for the commission of illegal acts under the orders of superior command? Can it seriously be contended that a German subaltern who commands his men to shoot batches of non - combatants without trial is not a war criminal because he acted under orders from headquarters? Is the officer ... who sent to their death over 1,200 non - combatants on board the Lusitania to be treated when captured as a prisoner of war because he obeyed the orders of the German Admiralty? In both cases these officers knew ... they were committing violations of well known usage of warfare...."[130]

These views are consistent with the common law position, [131] which did not recognise the defence of superior orders to a criminal act. At the conclusion of the war, with conflicting views as to whether or not the Germans who had violated the humanitarian laws should be held responsible for their actions, and whether or not they could rely on the defence of superior orders, the Preliminary Peace Conference created the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties to study the issue of accountability for the war.[132]

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130 Ibid at 31, 49.

131 *United States v Jones,* (1813) 26 F. Cas., 653 - 654; *Little v Barreme,* (1804), 6 Cranch, 170; *Mitchell v Harmony* (1851) 13 How., 115, 149. *R v Smith* (1900), 17 Special Courts Reports of Good Hope (South Africa), 56.

132 "Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties" (1920), 14 *American Journal of International Law,* 95. The Commission composed of fifteen members, two each from The United States, The United Kingdom, France, Italy and Japan, and the other five members elected from the Allied Power with special interests.

The Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties, in March 1919, reported that:

> "military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence."[133]

As to the second question of the plea of superior orders, the Conference left the decision to the courts to determine whether or not a defence of obeying superior orders was sufficient to negate the charges against the person. This report resulted in the Allies drafting the *Treaty of Versailles;* Article 228 set in motion the "bringing before military tribunals persons accused of having committed acts in violation of the laws of wars and customs of war."[134]

Not surprisingly, during the debate at the Preliminary Peace Conference, The United States and The United Kingdom strongly objected to the notion of war crimes. They argued that there was no international law denoting war crimes, but their main concern was that recognising an international war crime would create a precedent that might be applicable to national leaders in the future.[135] As a result of the objections by The United States and The United Kingdom, the reports of the Commission did not lead to an international tribunal for war crimes but rather a normal military trial.[136] It was not surprising to note that the Commission identified eight hundred and ninety six alleged

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133 Ibid at 117.

134 Fred Israel, "*Major Peace Treaties of Modern History*", vol II, (1967) Chelsea House Publishers, New York, 1288.

135 United Nations, *"Historical Survey of the Question of International Criminal Jurisdiction*", (1960) United Nations Publications, New York, 56 - 58.

136 Alan M Wilner, "Superior Orders as a Defence to Violations of International Criminal Law", (1966) *26 Med. L. Rev*., 127, 130.

"battlefield war criminals".[137] With strong protests from Germany about having its nationals tried by foreign courts, the Allies agreed to allow Germany to prosecute a selected number of individuals before the Criminal Senate of the Imperial Court of Justice of Germany at Leipzig.[138]

The Leipzig Trial as it came to be known, listed forty - five accused to be tried for war crimes, but the number was reduced to only twelve just days before the trial commenced.[139] Of the accused charged, three raised the defence of superior orders. Major Benno Crusius, in his defence, had argued that General Karl Stenger had ordered the execution of enemy prisoners and wounded captured in battle. Major Crusius was charged with carrying out General Stenger's orders as well as killing at least seven French prisoners and wounded.[140] General Stenger and his subordinate officers testified that Major Crusius had misconstrued the General's remark and "failed to fully grasp the illicit nature of the orders"[141] which, as submitted:

> "... seems only comprehensible in view of the mental condition of the accused.... He was intensely excited and suffered from nervous complaints.... These complaints did not preclude the free exercise of his will, but were nevertheless likely to affect his powers of comprehension and judgment.... Had he applied the attention which was to be expected ... [then] what was immediately clear too

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137 George G Battle, "The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes", (1921) *8 Virginia Law Review*, 18.

138 Ibid at 18.

139 Ibid.

140 Claud Mullins, "*The Leipzig Trials: An Account of the War Criminals Trial and Study of German Mentality*", (1921) HF & G. Witherby, London, 151.

141 Ibid at 160

> many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way justified."[142]

The court convicted Major Crusius of "killing through negligence"[143] and sentenced him to two years' imprisonment.

In the second case, First Lieutenant Karl Neumann of the German Navy and Commander of the submarine U.C. 67 was charged for sinking the hospital ship Dover Castle on 26 May, 1917, killing six members of the crew.[144] Lieutenant Neumann in defence claimed to have been following orders from German Admiralty. He claimed the German Admiralty had issued a memorandum in 1917 that stated that hospital ships traveling the Mediterranean were being used as military transports and were to be regarded as vessels of war.[145] The court concluded that Lieutenant Neumann had relied on the memorandum in carrying out his naval duty, which he deemed to be in accordance with the laws of warfare.

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142 Ibid.

143 Ibid at 167 - 168. The Criminal Senate of the Imperial Court of Justice of Germany debated on the mental incapacity of Major Crusius at the time of committing the act. The Court held that under the German Penal Code, "there is no criminal act if the doer at the time of his act was in a state of unconsciousness, or if his mind was deranged so that there could be no free violation on his part." The Court held Major Crusius did suffer from a degenerative mental disease and by the afternoon had suffered: "a complete mental derangement excluding beyond any doubt all criminal responsibility....".

144 Hospital Ship Dover Castle was initially torpedoed by Submarine U C. 67, the accompanying destroyer rescued the crew as well as the sick and wounded. Ninety minutes later, a second torpedo was fired which sunk the hospital ship.

145 "Judgement in Case of Commander Karl Neumann", (1921) *16 American Journal of International Law*, 704, 705 - 706.

The court also held that Commander Neumann could rely on the defence of superior orders. In support of its decision, the German Court applied the German obedience to orders which was provided in Section 47 (2) of the German Military Penal Code, which stated:

> "the obeying subordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at civil or military crime or offence."[146]

The Court also held that:

> "It is a military principle that the subordinate is bound to obey the orders of his superiors. The duty of obedience is of considerable importance from the point of view of the criminal law. Its consequences are that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.... A subordinate who has acted in conformity with orders may be punished in those instances in which the individual has gone beyond the scope of his orders or possessed knowledge that he had been ordered to commit a criminal act. The Court noted as to the former factor that the hospital ship was accompanied by two warships and it was impossible to issue a warning. Neumann did not act with particular brutality and made every effort to rescue those on board. Neumann also believed he was engaged in a legitimate reprisal."[147]

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146 G Lewy, "Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age", (1961) *55 American Political Science Review*, 3, 6.

147 "Judgement in Case of Commander Karl Neumann", (1921) *16 American Journal of International Law*, 704, 707.

Applying the German standards, the Criminal Senate of the Imperial Court of Justice of Germany at Leipzig acquitted Commander Neumann.

The third case which arose out of similar circumstances was that of the trial of First Lieutenants Ludwig Dithmar and John Boldt. On 27 June 1918, the Canadian hospital ship Llandovery Castle was torpedoed and sunk off the Irish Coast by German U - Boat 86.[148] Only twenty four of the two hundred and fifty eight survived. At trial, evidence revealed that the commander of the German U - Boat, Captain Helmut Patzig attacked the Llandovery Castle fully cognizant of the fact it was outside the attack area announced by the German command. Captain Patzig, assuming that there were American airmen on the hospital ship, launched a torpedo.

The hospital ship sank within ten minutes of being hit; a small number of crew, wounded and sick were freed in three lifeboats. Captain Patzig approached the lifeboat, where strong protest were made that the ship was carrying neither military personnel nor ammunitions. To conceal the sinking of the hospital ship, Captain Patzig ordered the two accused, lieutenants Dithmar and Boldt to help kill the survivors.[149] Captain Patzig ordered Boatswain Mate Meissner to fire at the life boats, sinking two. Lieutenants Dithmar and Boldt had remained on deck and spotted targets for the Boatswain.

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148 "Judgement in the Case of Lieutenants Dithmar and Boldt", (1922) *16 American Journal of International Law*, 708.

149 Ibid 708, 716 - 717. Captain Patzig in concealing the incident had made no entries in the log, altered the sailing chart and got promises of the crews to remain silent.

In defence, both Lieutenants Dithmar and Boldt pleaded obedience to superior orders from the German Naval High Command and Captain Patzig. Not surprisingly, both the Lieutenants were found not guilty for sinking the hospital ship by reason of obedience to superior orders. However, for their part in killing the survivors, both were found guilty of being an accessory to murder. The Court in their ruling explained:

> "According to the Military Penal Code, if the execution of an order ... involves such a violation of law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order ... involved the infringement of civil or military law. This applies in the case of the accused."[150]

Lieutenant Dithmar and Boldt were sentenced to four years imprisonment. The light punishment was due to the mitigating circumstance that the defendants had been trained to obey orders. The Court however did rule that international law prohibited attacks on unarmed enemies and shipwrecked individuals at sea, the statement becoming a bench mark in the recognition of international law in armed conflicts:

> "The killing of enemies in war is in accordance with the will of the State that makes war ... only in so far as such killing is in accordance with the conditions and limitations imposed by the laws of nations. The fact that his deed is a violation of international law must be well known to the doer, apart from acts of carelessness, in which ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be borne in

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150 Ibid at 708, 721.

> mind, because in war time decision of great importance have frequently to be made on very insufficient material....”[151]

Commentators have regarded the Leipzig Trials to be a “farce”.[152] Of the twelve accused of war crimes, six were acquitted of all charges. Although the maximum penalty for war crimes was then death, the other six received punishment ranging from one to four years imprisonment.[153] Although the defence of superior orders was raised, it remained

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151 Ibid.

152 Alan M Wilner, “Superior Orders as a Defence to Violations of International Criminal Law”, (1966) *26 Maryland Law Review*, 127, 134.

153 During World War I, the Allies considered punishing any German who had violated the law of war, from the Kaiser to the lowest conscript. At the war’s conclusion, the Preliminary Peace Conference created the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties to study the issue of accountability for the war. In March 1919, the Conference reported that military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense. The Conference declared that the courts would determine whether a plea of superior orders was sufficient to acquit the person charged. While this statement by the Commission concerned primarily senior governmental and military authorities, it was equally applicable to more junior officers. Consequently, the Allies drafted Article 228 of the Treaty of Versailles, which decreed their intention to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Thus, contrary to the American, British, and French manuals of the day, Article 228 evinced the collective intention of the Allies to apply individual responsibility for law of war violations, without regard for the defense of superior orders. The Allies rejected the then current United States military standard. On the issue of personal criminal responsibility, however, the Commission found that the Americans, whose military had retreated from that concept with its *Rule of Land Warfare Manual*, were surprisingly resistant. The United States’ representatives to the Commission believed that there was no international law making war crimes an individually punishable offense and feared the establishment of precedent that might be applicable to national leaders in the future. Accordingly, the United States representatives objected to charging, without distinction of rank, enemy authorities who ordered or who failed to prevent violations of the laws of war. If morally and legally questionable by today’s lights, that position was consistent with then-current military thinking as reflected in American manuals. The United States and the United Kingdom opposed the creation of a new tribunal to try war criminals and the promulgation

"perniciously political".[154] A similar defence was used by Captain Charles Fryatt [155]who had attempted to ram a German Submarine in accordance with the British Admiralty's instruction.[156] Captain Fryatt was found guilty and subsequently executed by the Germans.[157]

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of new laws or penalties. The majority of the Commission rejected the American objections and disassociated itself from the position of the United States and United Kingdom. Nevertheless, the Commission did not consider it within its province to lay down detailed principles for the guidance of national courts in the matter. The British and Americans remained unmoved. At the end of the day, the issue remained unresolved and the work of the Commission led not to an international tribunal for war criminals, but rather the Leipzig Trials, the only war crimes proceedings to be held after the World War I. The Commission identified 896 alleged battlefield war criminals. Germany protested the trial of its nationals by foreign courts. Due to the instability of the German Government, the Allies compromised and agreed to allow Germany to prosecute a selected number of individuals before the Criminal Senate of the Imperial Court of Justice of Germany, which presided in Leipzig. The number of accused shrank to forty-five, and the Allies allowed Germany to prosecute its own citizens in what became known as the Leipzig Trials. The Imperial Court eventually tried only twelve of the forty-five. According to one source, during the trials that went forward, the doctrine of superior orders and the plea of military necessity were elevated to paramount legal principles. Although the maximum punishment for war crimes was then, as it is today, death, the Court acquitted six of the twelve, and issued sentences to confinement of less than one year to three of the remaining six. The Court imposed its longest sentence, four years, to an individual who later escaped to Sweden after only a few months.

154 J B Scott, "The Execution of Captain Fryatt", (1916) *10 American Journal of International Law,* 865.

155 Ibid.

156 Captain Charles Fryatt of the Great Eastern Railway Steamer *SS Brussels* was a regular on the Rotterdam/British East Coast route since the start of the war and this was the cause of much annoyance to the Germans. In March 1915 they made two determined efforts to sink the *SS Brussels*. On the 3rd March 1915 Capt. Fryatt successfully dodged an attack on his ship by a U-Boat and sailed home to a hero's reception and was presented with a gold watch by the ship's owners. On the 28th March 1915 a further attempt was made to sink his ship by a U-Boat. Capt. Fryatt saw it surface and as it was trying to line up a torpedo shot on the ship, he turned the helm over and bore down on the U-Boat which was forced to crash dive in order to avoid him. It appears that the U-Boat passed from starboard to port under the ship as it surfaced close enough to the ship so that, as Capt. Fryatt

reported "you could have easily hung your hat on the periscope as she lay along side us". The U-Boat then disappeared never to be seen again. Capt. Fryatt was awarded another gold watch, this time by the Admiralty.

Captain Fryatt continued his voyages for another fifteen months until on the 23rd June, 1916, he was trapped by a flotilla of German torpedo boats and taken to Zeebrugge. He was tried by a Court Martial in Bruges on 27th July. By all accounts, he was convicted before the trial even took place. It condemned Capt. Fryatt to death as a *franc-tireur*. (used to describe irregular military formations deployed by France during the early stages of the Franco-Prussian War (1870–1871) and from that usage it is sometimes used to refer more generally to guerrilla fighters who fight outside the laws of war. The term was revived and used by French partisans to describe the French Resistance movements set up by the French against the Germans during World War II) The sentence being confirmed by the Kaiser. He was executed that same evening. He was buried in a small cemetery just outside Bruges which the Germans used to bury Belgian "Traitors".

The outcry in Britain was enormous. Asquith, in Parliament, stated "The Government are determined that this country will not tolerate a resumption of diplomatic intercourse until reparation has been made for this murder.

It seems that the Germans tried to use Captain Charles Fryatt as a warning to the British Mercantile Marine which was largely ignoring German efforts to bottle them up in port.

The reason was that he, as a merchant navy officer and, in the eyes of the Germans thus being not a military man but a civilian, tried to ram a German submarine March 28 1915.

A press article after the execution said: Fryatt, Master of the British merchant ship *SS Brussels* (Great Eastern Railway Company) sailed from Rotterdam to Southampton when his ship was stopped on June 23 1916 by a German torpedo boat and interned in Zeebrugge Belgium. Fryatt was arrested when the Germans found a decoration (medaille), which he received, from the British Admiralty for his courage in trying to sink/ram a German submarine in 1915.

The Germans held that Fryatt, was not a military man but a non-combatant and thus subject to the rules of "The Hague Convention". He was tried and executed.

The British accused the Germans of murder and denied that Fryatt tried to ram the submarine. Instead, they made public that: "He saved his vessel and the lives of his passengers and crew by skillfully avoiding an attack and in recognition of his coolness and judgement the Admiralty made him a presentation".

Unfortunately the House of Commons, at the time of the presentation, publicly applauded Fryatt’s attempts to ram the submarine and the inscription in Fryatt’s

golden watch, which he received from the Admiralty at that date, also was very specific and clear. He did try to ram the sub. He did so on Churchill's orders for mercantile marine Captains which said:

- 1: All British merchant ships to paint out their names and port of registry, and when in British waters to fly the flag of a neutral power.(preferably the American flag) (source: World crisis vol 2 p.283)

- 2: British vessels are ordered to treat the crews of captured U-boats as "felons" and not to accord them the status of prisoners of war.(source: Simpson. Lusitania p.36)

- 3: Survivors should be taken prisoner or shot whichever is the most convenient.

- 4: In all actions, white flags would be fired upon with promptitude. (Source Richmond diaries 27-2-15)

Churchill continued: "The first British countermove made on my responsibility was to deter the Germans from surface attack. The submerged U-boat had to rely increasingly on underwater attack and thus ran the greater risk of mistaking neutral for British ships and of drowning neutral crews and thus embroiling Germany with other Great Powers." (Source Churchill World crisis. p.724-725)

He then gave very specific orders to civilian mercantile marine captains, he ordered them: "to immediately engage the enemy, either with their armament if they possess it, or by ramming if they do not" and he continued then: "ANY MASTER WHO SURRENDERS HIS SHIP WILL BE PROSECUTED". (Source: ibidem). With this order, civilian captains had but one choice, to become a franc-tireur with the risk to be executed by the Germans, or to be executed by their own landsman for cowardice in the sight of the enemy.

Ironically, the captain of the German U-33 who stopped the *SS Brussels* that day in March handled in accordance with the so-called international cruiser rules. He surfaced, ordered the *SS Brussels* crew to leave their ship before firing his torpedo. Suddenly, Fryatt ordered full-ahead and tried to ram in which he was partly successful.

157 Ibid. The German court refused the plea of self defence on the basis that a Treaty had existed on submarine warfare which was drafted in The Washington Conference on the Limitation of Armament.(“A Treaty on Submarines and Noxious Gases in Warfare”, (1922), 16 in Scott J B, “The Execution of Captain Fryatt”, (1916) 10 *American Journal of International Law,* 137.) The Court held that the Treaty abrogated the superior orders defence. What was most surprising is that the Treaty was not ratified and was not recognised by most states.

3.1.4. The Second World War and Aftermath: Genesis of a New Standard in the Defence of Superior Orders.

One of the major concerns that flowed from the First World War was the issue of whether the customary international laws of war were to apply to nations or individuals, and whether or not a state had jurisdiction to try an individual of another state. Under the Act of State Doctrine, the courts held that "no state could exercise jurisdiction over another state".[158] This concept was based on the principles of the sovereignty and equality of states. The courts held that sovereignty was attached to an individual within a state and "not just as an abstract manifestation of the existence"[159] and the power of the state itself. The courts considered it proper that an individual of a sovereign state could not be subjected to the jurisdiction of a foreign court.[160]

With the events of the First World War still fresh, the outcome of events and trials of individuals like Captain Fryatt remained a nagging concern for the Western states. The United States and The United Kingdom considering the provisions of the Act of State Doctrine, viewed military personnel as personifications of their states. It was a common view that if the state, which was exempted from criminal process, ordered a common soldier to act, the soldier had no option but to obey. It was reasoned that since the soldier had no choice but to obey, the soldier must be free from all liabilities from those acts. Despite these provisions, Western states started to question the doctrine, holding that military personnel were not personifications of the state. Why was there a sudden change of heart? I am of the view that the changes were mainly due to the ability of trying

158 *Feres v United States,* (1950) 340 U.S., 135, 159.

159 *Schooner Exchange v McFaddon,* (1812) 7 Cranch, 116.

160 Ibid. The case held that a public vessel of war of a foreign sovereign at peace with the United States was exempted from the jurisdiction of the United States.

Kaisers, kings and commanders for war crimes, which the doctrine had somewhat protected. By the beginning of the Second World War, the Western states had completely rejected the Act of State Doctrine.[161]

As international humanitarian law developed, numerous bilateral and multilateral treaties were entered into to address grave breaches and atrocities. Despite so many treaties, the international community was silent on the subject of superior orders. However, there was one exception in 1922 when The Washington Treaty relating to submarine and poisonous gases in warfare was adopted.[162] Article II of the treaty declared that:

> "any person ... who shall violate any of these rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punished...."[163]

The Treaty was ratified by The United States, The United Kingdom, Italy, and Japan. France refused. Surprisingly, Germany who had as early as 1916 recognised and used the provisions to prosecute Allied Officers was not invited to ratify the treaty.

The Washington Treaty of 1922 had only reinforced the positions of the United States and the United Kingdom of seeing a superior order as a complete defence to war crimes.

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161 Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals", (1943) *31 California Law Review*, 530 - 538.

162 "*Treaty Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and To Prevent the Use of Noxious Gases and Chemicals*", (6 Feb., 1922) 16 American Journal of International Law, 137.) We will remember that this exact Treaty was used in finding Captain Fryatt guilty in 1916, and sentenced to execution.

163 Art II at 3118, "*Treaty Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and To Prevent the Use of Noxious Gases and Chemicals*", (6 Feb., 1922) 16 American Journal of International Law, 137.

The United Kingdom went as far as stating in the 1929 edition of its warfare manual, that:

> "It is important, however, to note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into their hands...."[164]

The United States also maintained a similar position, holding that a soldier's war crimes remain fully exempted from prosecution if the soldier committed the crime whilst following orders from a superior.[165] Surprisingly, the United States and the United Kingdom failed in their rules to clearly qualify that the orders given must be legal, reasonable and within the authority of the superior.

3.1.4.1. World War II: Revisiting the Old Standards.

It was not surprising to see that as the Second World War raged on, the Western countries especially the United Kingdom and the United States had a different opinion of the provisions concerning the defence of superior orders for war crimes. There were already talks within the Allied camps amongst officials as early as 1942, to consider the possibility of punishing Axis leaders for their role in the war. These considerations were not only directed at the leaders but also the commanders and subordinates who had

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164 James Edward Edmonds & Lassa Oppenheim, "*Land Warfare: An Exposition of the Laws and Usage of War on Land for the Guidance of Officers of His Majesty's Army*", (1929) His Majesty's Stationary Office, London, 95.

165 Paragraph 352 of the Rules of Land Warfare II (1934) in Wells Donald Arthur, "*The Laws of Land Warfare: A Guide to the United States Army Manual*", (1992) Greenwood Publishing Group Inc., Westport, 8.

committed war crimes.[166] With bitter memories of the First World War and the discouraging results from the Leipzig Trials, The United States and The United Kingdom decided that they could no longer sponsor the defence of superior orders. The decision was made to re - evaluate the policies and the rules to deny the Axis the opportunity to invoke such defences.[167]

The concern of invoking the defence of superior orders to escape the punishment of battlefield war crimes was also the concern of the League of Nations. The London International Assembly, created in 1941, which was responsible for post - war problems and designing a framework for the establishment of a new United Nations, saw the issue of the retribution for Second World war crimes as its priority. The London International Assembly created the International Commission of Penal Reconstruction and Development, aimed at formulating rules and procedures to govern war crime prosecution.[168] Professor Lauterpacht submitted to the Commission a memorandum, urging that the defence of superior orders be only made available to "an accused who can make out a case of compulsion."[169] He urged,

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166 Hersch Lauterpacht, "*The Law of Nations and the Punishment of War Crimes*", (1944) 21 British Yearbook of International Law, Oxford University Press, London, 58, 71.

167 Mark J Osiel, "*Obeying Orders: Atrocity, Military Discipline & the Law of War*", (1999) Transaction Publishers, New Brunswick, 58. Osiel argues that "the decline of respondeat superior in ... military penal codes of most nations has been less a result of logic than a painful experience." He goes further in saying, that "it was the historical experience of Nazi war crimes, conducted under superior orders that led national and international legislators to reassess."

168 The United Nations War Crimes Commission, "*History of the United Nations War Crimes Commission and the Development of the Laws of War*", (1948) His Majesty's Stationary Office, London, 266.

169 Ibid at 266.

> "the manifest illegality of an order should preclude the defence entirely... the rules of warfare, like other rules of international law, are binding not upon impersonal entities, but upon human beings...."[170]

The commission agreed with Professor Lauterpacht and also agreed that the Act of State Doctrine which they thought might protect the Axis leaders as political agents of their states by granting them immunity from prosecution should come to an end,. [171]

The United Nations War Commission which was formed in January 1944 was given the task of deciding on the superior orders defence issue. The United States and The United Kingdom rallied behind each other in recommending the defence be abrogated. The Commission could not come to an agreement on the issue, especially due to the varying laws on the issues of its member states. Like the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties in March 1919, the United Nations War Commission recommended that the validity of the defence of superior orders be left to national courts, "according to their own views of the merits and limits of the plea."[172]

Three months after the United Nations War Commission recommendation, The United States and The United Kingdom revised their manual on defence of superior orders. The two states adopted word for word Professors Lauterpacht's modification of the 1906 Oppenheim's International Law which was instrumental in establishing the Anglo -

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170 Ibid.

171 Ibid.

172 The United Nations War Crimes Commission, "*History of the United Nations War Crimes Commission and the Development of the Laws of War*", (1948) His Majesty's Stationary Office, London, 278.

American military standards of liability for obedience to superior orders. The changes now consider individuals, organisations and government leaders, culpable of war crime offences.[173]

> "Individuals and organisations who violate the accepted laws and customs of war may be punished there for. However, the fact that the acts complained of were done pursuant to orders of a superior or government sanction may be taken into consideration in determining culpability, either by law of defence or in mitigation of punishment. The person giving such orders may also be punished."[174]

The Second World War saw a change of the doctrine of defence of superior orders. Although the Allied forces had revised their military manuals, the application of the provisions concerning war crimes, especially arising out of superior orders, was missing. For example, General George Patton on the 27 June 1943, whilst addressing the 45th Infantry Division prior to the invasion of Sicily said:

> "attack rapidly, ruthlessly, viciously and without rest, and *kill even civilians who have the stupidity to fight us*.... If the enemy resisted until we got within 200 yards, *he had forfeited his rights to live*."[175] [emphasis added.]

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173 Morris Greenspan, "*The Modern Law of Land Warfare*", (1959) vol 3, University of California Press, Berkeley, California, 491. France and Canada made similar changes to their laws of war manual; the Soviet remained, as it been before, identical to the old Anglo - American position.

174 United States Army, Form 27 - 10, "Field Manual: Rules of Land Warfare", (1944) para 345 (1), in Donald Arthur Wells, "*The Laws of Land Warfare: A Guide to the United States Army Manual*", (1992) Greenwood Publishing Group Inc., Westport, 67.

175 Aubrey M Daniel, "*The Defence of Superior Orders*", (Spring, 1973) 7 University of Richmond Law Review, 477, 498 - 499; Farago Ladislas, "*Patton: Ordeal and Triumph*", (1963), Dell Publishing Co, New York, 415.

A few days later, during the invasion, a captain of the Division lined up forty - three captured Germans and directed they be executed by machine gun fire. In another incident during the same invasion, a sergeant murdered thirty - six German prisoners whilst escorting them to the rear echelon.

In the court martial convened against the Captain John T Compton and Sergeant Horace T West, ironically by General Patton himself, both Captain Compton and Sergeant West[176] raised in their defence that they were complying with the orders issued by General Patton before the invasion.[177] Sergeant West was found guilty and sentenced to life imprisonment. He was released as a private.[178] Captain Compton was acquitted of the charges as a result of technical errors in bringing about the charge.[179] The trial illustrated the fact that it was not only the Germans who appreciated a defence of superior orders, the Americans and its Allies were keen in adopting the same. General Patton was exonerated from his remarks, the inquiry finding that there was no intention on his part to direct any illegal acts against persons.[180]

In another incident, in January 1943, The United States submarine, The USS Wahoo (SS - 238) under the command of Commander Dudley W. Morton, fired on and sank a troop carrying freighter. The sea was filled with Japanese survivors. Commander Morton

176 James Weingartner, "Massacre at Biscari: Patton and An American War Crime", (Nov., 1989), *The Historian LII*, no. 1, 24-39.

177 Leslie Claude Green, "*Superior Orders in National and International Law*", (1976) W. Sijthoff, Leyden, 131.

178 James Weingartner, "Massacre at Biscari: Patton and An American War Crime", (Nov., 1989), *The Historian LII*, no. 1, 24-39.

179 Ibid.

180 Ladislas Farago, "*Patton: Ordeal and Triumph*", (1963) Dell Publishing Co, New York, 415 – 416.

surfaced his submarine, and ordered his sailors to fire the deck and machine guns on the Japanese lifeboat and survivors in the water.[181] The execution lasted for more than an hour. Describing the scene, the Wahoo's second - in - command, Commander Richard O'Kane said:

> "Wahoo's fire ... was methodical, the small guns sweeping from abeam forward like fire hoses cleaning a street...."[182]

For their action at sea, the Wahoo was awarded with a Presidential Unit Citation, and Commander Morton presented with a Navy Cross (The American Navy's highest award for bravery). The events of the day were clearly logged as it happened in the submarine's log book. Despite numerous protests by The Germans, The United States neither raised nor questioned the acts or orders of Commander Morton.[183] Unlike the Leipzig Trial where Lieutenants Dithmar and Boldt were convicted and punished for similar crimes, Commander Morton not only escaped punishment but was decorated for his crimes.

The varying decision in the two cases did not concern the applicable laws concerning the defence of superior order; rather it was the reluctance of the Americans to prosecute its personnel in the height of the war. Any prosecution by the Americans would have affected the moral and the fighting will of its soldiers.[184] The Americans were just gaining momentum in its war effort and had just managed to solicit public support for the Allied Force; the least they wanted was for an incident such as that involving

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181 Clay Blair, "Silent Victory", (1975) JB Lippincott, Philadelphia, 384.

182 Richard Hetherington O'Kane, "*Wahoo : The Patrols of America's Most Famous World War II Submarine,*" (1987) Presido Press, New York, 154.

183 Clay Blair, "Silent Victory", (1975), JB Lippincott, Philadelphia, 384.

184 Ibid at 163 – 176.

Commander Morton. Secondly, it seemed that there was a growing feeling amongst the Allied Forces that defeat of Germany and the Axis Forces was imminent and that they were immune from any criminal act, terming their conduct as been "victory justice".[185]

3.1.4.2. The Nuremberg International Military Tribunal: New Standards in the Defence for Superior Orders.

The London Agreement of August 1945, relying on the reports and recommendations of the United Nations War Crimes Commission, set out the rules for the trials of war crimes in the International Military Tribunal's Charter.[186] Article 8 of the Charter incorporated the changes proposed by Professor Lauterpacht, which had already been incorporated in the Rules of Land Warfare. Article 8 read:

> "the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment...."[187]

It was apparent that the International Military Tribunal intended to hold individuals responsible for the war crimes they committed, and also for the acts of crimes they ordered.[188] Undoubtedly, the Tribunal was adamant this time that they would not be

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185 K Kittichaidaree, "*International Criminal Law*", *(2002) The Human Rights Law Resources*", http://www.hrw.org., 2

186 Telford Taylor, "*Final Report to the Secretary of the Army on the Nuremberg War Crimes Trial Under Control Council Law No 10*" (1949) in http://library.law.columbia.edu/ttp/TTP_LOS.htm, 1.

187 International Military Tribunal, "*Trial of the Major War Criminals Before the International Military Tribunal*", (1947) vol I, 10, 12 in http://www.yale.edu/lawweb/avalon/imt/imt.htm, 1.

188 United States State Department, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials - London 1945*", (1949) Government Printing Office, Washington, 42. Justice Jackson in his report to President Roosevelt noted that the immunity accorded to the heads of

deterred or denied the opportunity. Most of all, obedience to superior orders was not going to be used as a veil, as was successfully done in the Leipzig Trials. The International Military Tribunal in the Leipzig Trial with reference to war crimes, stated:

> "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."[189]

There is no doubt that the International Military Tribunal Charter[190] sought to hold individuals, especially senior officers (commanders) and government officials accountable for war crimes. The International Military Tribunal Charter did however incorporate a proviso in the interpretation of the Charter: "The True Test"[191] provision. This "True Test" was not in any way designed to inquire whether there was "the existence of the [manifestly illegal] order, but whether moral choice was in fact

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state, as well as the superior orders defence, impeded the imposition of criminal liability:
"It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organised cannot tolerate so broad an area of official responsibility." (ibid at 47).
He conceded that superior orders should be available to conscripts serving in firing squads. However, he argued the defence should not apply to individuals who possess discretion as to whether to obey an order or who voluntarily enlist in a criminal organisation. Judge Jackson recommended that the International Military Tribunal should determine on a case by case basis whether or not superior orders should "constitute a defence or merely extenuating circumstances, or perhaps carry no weight at all." (ibid)

189 International Military Tribunal, "*Trial of the Major War Criminals Before the International Military Tribunal*", (1947) vol I, 10, 41.

190 Deinstein Yoram & Mala Tabory, "War Crimes in International Law", (1996) Maritinus Nijhoff Publishers, Hague, Boston, London, 382.

191 United Nations War Crimes Commission, "*Law Reports of Trials of War Criminals*", (1949) United Nations Assembly, New York, 361 - 411.

possible".[192] The issue of "moral choice"[193] would presumably depend on whether an individual was compelled to carry out an unlawful order under threat, serious bodily harm or death.

This test apparently left a lot of questions unanswered. For example, what factors will mitigate punishments? What test was to be used in making determinations as to the actual or constructive knowledge of unlawful orders? What test would be used in those criminal situations that are camouflaged as reprisals? Was there to be any consideration on the requirement of proportionality between the harm inflicted and the harm threatened? More importantly, should the threat have to be reasonable, immediate and imminent? What amount of harm, if any, could an individual inflict on others to safeguard themselves or others? The effects of the unanswered questions became relevant in the subsequent trials.

Article 8 of the Charter and the rules of the International Military Tribunal were put to the test when twenty two high level German defendants were prosecuted at Nuremberg. The question of superior orders defence was expressly tested and expressed in the case of General Alfred Jodl, the Chief of Operations Staff of the German High Command. General Jodl was the subordinate officer of Field Marshal Wilhelm Keitel, but reported

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192 Ibid at 364 - 411. This proviso was a compromise when General I.T. Nikitchenko queried, as a matter of principle, whether major Nazi leaders should be permitted to raise the defence of superior orders. (Ibid 360 - 367). Sir David Maxwell Fyfe of the United Kingdom argued that the application of the defence should remain within the discretion of the tribunal: "Suppose someone said he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life." (Ibid at 368). Sir David received unanimous support to modify the proposals, providing that: "superior orders should not be an absolute defence, but may be considered in mitigation of punishments." (Ibid 368.)

193 Ibid at 364 - 411.

directly to Fuhrer Adolf Hitler. He was instrumental in formulating orders and signed orders issued by Fuhrer Adolf Hitler which required the killing of Russian combatants without trial, the evacuation and destruction of Northern Norway and the decimation of Moscow and Leningrad. During trial, he raised the defence, that as a military man he was obliged to carry out these commands by superior officers. The superior orders plea was his main defence. The International Military Tribunal rejected his superior orders defence, saying:

> "There is nothing in mitigation. Participation in such crimes as these has never been required of any soldier and he [General Jodl] cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of those crimes."[194]

On 1 October, 1946, General Jodl was sentenced to death by hanging. Witnesses to the sentencing narrate that General Jodl conducted himself as a true soldier, accepting his sentence without flinching; he clicked his heels together in a proud military fashion. He was hanged on 16 October, 1946.[195]

After the International Military Tribunal, there was a series of war crimes trials initiated by the United States, France, United Kingdom and Russia in their respective sectors in Berlin. The Allied trials followed the International Military Tribunal in its method and

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194 International Military Tribunal, "*Trial of the Major War Criminals before the International Military Tribunal*", (1947) vol I, 10, 571.

195 Whitney R Harris, *Tyranny On Trial: The Trial of the Major German War criminals at the End of World War II at Nuremberg, Germany, 1945 - 1946*", (1954) Southern Methodist University Press, Dallas, 476 - 488.

purpose, the "Subsequent Proceedings"[196] as it became known, and from a Joint Chief of Staff directive incorporated rules and procedures that mirrored the International Military Tribunal's rules and procedures.[197] The Subsequent Proceedings resulted in twelve trials, A total of 1,672 high ranking military and German officials were tried, 1,090 were ultimately sentenced, 426 received the death penalty.[198]

It is surprising to note that despite the International Military Tribunal ruling there was no outright defence of superior orders, such defences were used in the last of the "Subsequent Proceedings." For the Germans, they failed to comprehend the refusal of such a defence. As Schutzstaffel General Otto Ohendorf declared:

> "... subordinates had sworn obedience to their superiors and therefore could not even conceive of questioning the legality of orders, thus he could not understand these orders being challenged by the tribunal."[199]

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196 Telford Taylor, "*Final Report to the Secretary of the Army on the Nuremberg War Crimes Trial Under Control Council Law No 10*" (1949) in http://library.law.columbia.edu/ttp/TTP_LOS.htm, 1.

197 Ibid at 1. The Control Council Law is a reference to the Allied Council that administered the governing of Berlin.

198 Whitney R Harris, *Tyranny On Trial: The Trial of the Major German War criminals at the End of World War II at Nuremberg, Germany, 1945 - 1946*", (1954) Southern Methodist University Press, Dallas, 545. Similar cases tried in Japan which came to be known as the "Tokyo war crimes Trial", saw twenty - five political and senior military leaders charged. All were found guilty, seven received the death penalty, 16 were sentence to life imprisonment, 1 for twenty years and 1 for seven years.

199 Telford Taylor, "*The Anatomy of the Nuremberg Trial*" (1992), in http://library.law.columbia.edu/ttp/TTP_LOS.htm, 248. In the trial General Ohlendorf in putting forward his argument, uttered, "*Befehl ist befehl*", meaning "Orders are orders". This was the common understanding expressed by most or all of the Germans put on trial.

3.1.5. The My Lai Incident.[200]

As Addicot and Hudson write:

> "If history teaches anything about avoiding the mistakes and disasters of the past, it is that humanity first must understand historical lessons – lessons often understood only after the expenditure of incredible amounts of human blood and treasure – and then must inculcate those lessons in the members of each of its succeeding generations" [201]

If the lessons of the atrocities during the two World Wars were insufficient, the world was to be awakened again and reminded of the violations and the heinous nature of war crimes, on this occasion at *My Lai.* Yet again, so innocently, the plea and defence of superior orders were systematically argued.

On March 16, 1968, an American Combat Task Force of the 23rd American Infantry Division conducted an airmobile operation into the village complex of *Son My*, in the province of *Quang Ngai, South Vietnam.* At *My Lai*, Lieutenant William Calley led his platoon into the village, describing the scene, Captain Aubrey M Daniel III, the Chief Prosecutor said:

> "Members of the accused's platoon … entered the village… and found old men, women and children, none of them armed, in hootches. Some were eating

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200 In drawing legal reasoning and lessons learnt concerning defence of superior orders, no better example can be found either than the *My Lai* Incident. Due to the unique nature of this case, The *My Lai* Incident will be used as a case study in Chapter 4 of this paper.

201 Frederick J Addicot and W A Hudson, "The Twenty – Fifth Anniversary Of My Lai: A Time To Inculcate The Lessons", (Winter 1993) 139 *Military Law Review*, 153, 154.

> breakfast. The men in Calley's platoon started gathering them up, some as a result of their training, and others at Calley's orders … Calley called on Meadlo and Conti to take care of these people, these women, children, babies and a few old men. They didn't know what he meant by take care of these people at that time. They didn't know that he had formed his intent to kill them … Lieutenant Calley returned and he said to Meadlo and Conti, "Why haven't you taken care of these people?" "We have" Meadlo told him. "We are guarding them" "I mean kill them … waste ' em" … Calley and Meadlo shot this people, these unarmed and unresisting old men, women and children. Some people tried to run. They were shot down in cold blood on the trail. Meadlo was crying. It was so repulsive … what he had to do at the directions of Lieutenant Calley"[202]

Lieutenant Calley was tried by a General Court Martial on charges of premeditated murder and assault with intent to murder.[203] On trial, Lieutenant Calley argued that he was merely following the orders of his superior, "… to destroy everything and everyone encountered in their rapid advance to *My Lai*".[204] On the defence of superior orders, the Court of Military Review endorsed the trial judge's instructions to the panel in that Lieutenant Calley could not rely on the defence if they find that: "Calley knew or a man

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202 Richard Hammer, "*The Court Martial of Lt Calley*", (1971) McCann & Geoghegan, Inc, Coward, New York, 76 – 78. Some 540 Men, Women and Children were massacred. Homes were destroyed and domestic animals killed. Several cases of rape were reported. During the whole operation, one American soldier was injured by friendly fire. Lieutenant Calley recorded the highest kill, approximately 107 men women and children and one specified two year old at point blank range.

203 Attached as Appendix 3 are exert of the trial of Lieutenant William Kelly.

204 *United States v Calley* (1973) 46 C.M.R. 1131, 1180 – 1181.

of ordinary sense and understanding would have known, that the order was illegal".[205] The Court went on to say that the illegality of the alleged order to Lieutenant Calley was:

> "apparent upon every cursory evaluation by a man of ordinary sense and understanding …. Casting the defence of obedience to orders solely in subjective terms of *mens rea* would operate practically to abrogate those objective restraints which are essential to functioning rules in law."[206]

On the submissions that the standards proposed by the lower courts were prejudicial in that limited mental capacity of certain soldiers was affected when faced with the ever changing standards and competing laws, the Court of Military Appeal in rejecting the argument said :

> "Whether Lieutenant Calley was the most ignorant person in the … Army … or the most intelligent, he must be presumed to know that he could not kill, … infants and unarmed civilians who were … demonstrably incapable of resistance…."[207]

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205 Ibid at1131, 1183

206 Ibid at 1183 - 1184

207 *United States v Calley* (1973) 48 C.M.R., 29. The American Military General Court Martial had adopted a similar position on the test for defence of superior orders. In the case of *United States v Griffen (1968) 39 C.M.R., 586*. A Viet Cong was captured. As the troops moved forward, they were obstructed by the presence of the prisoner. As wounded were being evacuated, request to remove the prisoner on the helicopter was denied. Staff sergeant Griffen overhead a radio transmission to execute the prisoner. The Court held that order relied on by Staff Sergeant Griffen was "so obvious beyond the scope of authority of the superior orders and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding"

It is interesting to note the dissenting decision of Chief Justice Darden when addressing the issues concerning standards applicable in the defence of superior orders. His Lordship held:

> "Although the charge the military judge gave on the defense of superior orders was not inconsistent with the Manual treatment of this subject, I believe the Manual provision is too strict in a combat environment. Among other things, this standard permits serious punishment of persons whose training and attitude incline them either to be enthusiastic about compliance with orders or not to challenge the authority of their superiors. The standard also permits conviction of members who are not persons of ordinary sense and understanding."[208]

The decision by Chief Justice Darden brought to attention the common arguments advanced by soldiers in concerning obedience to superior orders.

My Lai was important, for the decision did not only provide a bench mark for future soldering but more importantly, it formulated the need to strictly adhere to the laws regulating warfare. As Addicot and Hudson write:

> "*My Lai* must never be forgotten. Its horror and disgrace are precisely why *My Lai* must never be erased from the individual's memories…. Accordingly every American soldier must understand the significance of the *My Lai* massacre and steadfastly must keep it in the fore front of his or her conscious."[209]

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208 *United States v Calley* (1973) 22 USCMA, 534

209 Frederick J Addicot and W A Hudson, "The Twenty – Fifth Anniversary Of My Lai: A Time To Inculcate The Lessons", (Winter 1993) 139 *Military law Review*, 153, 154

Although Calley's case had provided some understanding and positions as to the defence of superior orders, the penalty for such breaches had not been relative to that which was pronounced on other servicemen tried for similar or lesser offences.[210] To witness how quickly these memories have faded away is best illustrated by the atrocities or breaches of humanitarian law during the war in Iraq. For the Americans, the current crises in Iraq provide some classic examples, and not surprisingly, although lessons may have taught us otherwise, the defence to superior orders has once more been argued in courts.

3.1.6. International Criminal Tribunals and Defence of Superior Orders.

As international humanitarian law developed, there was a need to prosecute person(s) who had committed or had been responsible for the commission of atrocities, crimes against peace or crime against humanity. After the Second World War, two such International Military Tribunals were commissioned. The First Tribunal commissioned by the United States of America, Great Britain, the Soviet Union and France at Nuremberg saw the trial of Nazi war criminals. The second tribunal was commissioned against the Japanese by General Douglas McArthur at Tokyo to try Japanese leaders who were alleged to have committed international crimes. The two Tribunals were said to be

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210 William Calley served a total of three years under house arrest at Fort Benning, Georgia and a further six months at Fort Leavenworth, Kansas. He was sentenced to a dismissal and confinement at hard labour for life. The sentence was later reduced to hard labour for twenty years and further reduced by the Secretary of the Army to ten years. Calley was released from confinement after his sentence was overturned by the Federal District Court of Georgia. In 1975 the Fifth Circuit Court of Appeal reinstated the conviction. Calley never returned to serve his sentence, instead he was paroled by the Secretary for the Army. Attached as Appendix 4 are the extracts from the trial of Lieutenant William Calley.

forums representing the "victor's justice".[211] Despite this criticism, the legal statements relating to international humanitarian law recognised by the two Tribunals was unanimously accepted by the United Nations General Assembly Resolution 95 (1) of 11 December 1946.[212]

In the year 1991, the international community again bore witness to grave atrocities that were committed in the Former Yugoslavia. In 1993, the United Nations Security Council, by invoking its powers under Chapter VII of the United Nations Charter, established an International Criminal Tribunal for the Former Yugoslavia, with the basic aim of restoring international peace and security.[213]

In recognising the grave commissions of atrocities in Rwanda, the United Nations Security Council, in exercising its powers under Chapter VII, on 8 November 1994 through Resolution 955, commissioned the International Criminal Tribunal for Rwanda. The Tribunal was intended to bring about national reconciliation, maintain peace and stability, and to prosecute those individuals who were responsible for genocide and other grave breaches of International humanitarian Law.[214]

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211 K Kittichaidaree, "*International Criminal Law", (2002) The Human Rights Law Resources*", http://www.hrw.org., 2

212 John R Pritchard, "*The Tokyo War Crimes Trial: The complete Transcripts of Proceedings of the International Military Tribunal for the Far East in Twenty Two Volumes*", (1981) New York & London Press, New York, vol 21, 306.

213 Established by the United Nations Security Council Resolution 827 of 25 May 1993, given the serious violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991.

214 United Nations, "*International Criminal Tribunal of Rwanda*", http://www:un.org/ictr/statute.html, 1

The formation of these two new International Criminal Tribunals had in itself certain characteristics that had not been present in earlier Tribunals. Firstly, the new Tribunals were created through the United Nations system using the powers of the Security Council. Secondly, the Tribunals were given jurisdiction over criminal matters and had primary jurisdiction over national courts, so far as to ask the national courts to suspend investigations or court proceedings, to allow the Tribunal to take over the cases or investigations. Thirdly, a person who had been tried before a national court could be retried before the Tribunal, if in the opinion of the Tribunal, such a national trial had not served the international interest, or had not been diligently tried. Lastly, the most renowned characteristics had been the provisions in the Statutes dealing with command responsibilities and the defence of superior orders. For the first time, specific provisions were provided, with clear demarcations made as to the defences invoked regarding command responsibilities and defence of superior orders. It is appropriate to look in turn at the two Statutes and see how the Tribunals interpreted and addressed these provisions relating to the defence.

3.1.6.1. The International Criminal Tribunal of Former Yugoslavia and the Defence of Superior Orders.

The International Criminal Tribunal for the Former Yugoslavia was effective as of 1 January 1991, allowing the Tribunal to embrace all crimes committed in the Territory. The Statute of the International Criminal Tribunal for the Former Yugoslavia recognised four distinct areas of international humanitarian law that may have been breached. Firstly, Article 2 recognised grave breaches of the Geneva conventions of 1949. Secondly,

Article 3 recognised Violations of the laws or customs of laws. Thirdly, Article 4 recognised Genocide and, lastly, Article 5 recognised Crimes against Humanity.[215] Pursuant to Article 1, the Tribunal was empowered to exercise these International Humanitarian Laws, irrespective of whether the State was a signatory to these international instruments and had adhered to them by codifying the same in their domestic legislations.[216]

One of the most striking characteristics of the Statute of the International Criminal Tribunal for the Former Yugoslavia is the provisions relating to individual criminal responsibility. Article 7 of the Statute provides as follows:

> "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to

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215 United Nations, "*Statute of the International Criminal Tribunal of the Former Yugoslavia*", http://www:un.org/icty/statute.html, 1 – 4.

216 http://www.icrc.org/ihl.nsf. The Republic of Former Yugoslavia was a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, the Four Geneva Conventions of 1949, 12 August 1949, Convention on the Non – Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, Protocol Additional to the Geneva Convention of 1949 (Protocol I and II), 8 June 1977.

commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."[217]

Literally, Article 7 (4) excludes any defence of obedience to superior orders and any such obedience becomes a factor in mitigation of punishment. The Nuremberg Trial considered a defence of superior orders under extraordinary circumstances, saying:

"The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[218]

The issue relating to defence of superior orders had been addressed in a few cases already tried before the International Criminal Tribunal for the Former Yugoslavia. The following positions were adopted:

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[217] United Nations, "*Statute of the International Criminal Tribunal of the Former Yugoslavia*", http://www:un.org/icty/statute.html, 1 – 4.

[218] *France et al.* v. *Goering et al.*, (1946), 22, Trial of the Major War Criminals before the International Military Tribunal, 203, 466.

3.1.6.1.1. The Case of *the Prosecutor v Drazen Erdemovic.*[219]

Pursuant to Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Tribunal, in exercising its primacy over national courts had ordered the transfer of Drazen Erdemovic to the Tribunal's Detention Unit. Drazen Erdemovic was at the time being held by the authorities of the Federal Republic of Yugoslavia relating to allegations of war crimes. On 29 May 1996, the Prosecutor of the International Tribunal, pursuant to Article 18 of the Statute, submitted to the reviewing Judge an indictment against Drazen Erdemovic. The latter was accused of having committed a crime against humanity (Article 5 of the Statute) or a violation of the laws and customs of war (Article 3 of the Statute) for the following:

> "Drazen Erdemovic, born on 25 November 1971, in the municipality of Tuzla in Bosnia and Herzegovina, was a member of the 10th Sabotage Detachment of the Bosnian Serb army. On 16 July 1995, he was sent with other members of his unit to the Branjevo collective farm near Pilica, north-west of Zvornik. Once there, they were informed that later that day Muslim men from 17 to 60 years of age would be brought to the farm in buses. The men were unarmed civilians who had surrendered to the members of the Bosnian Serb army or police after the fall of the United Nations "safe area" at Srebrenica. Members of the military police took the civilians off the buses in groups of ten and escorted them to a field next to the farm buildings, where they were lined up with their backs to a firing squad. The

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219 *The Prosecutor v Drazen Erdemovic* [1996] ICTY1, 1, (29 November 1996) http://www:worldlii.org/int/cases/ICTY/1996/1.html.

> men were then killed by Drazen Erdemovic and other members of his unit with the help of soldiers from another brigade."[220]

On 31 May 1996, at the hearing, Drazen Erdemovic pleaded guilty to Count No. 1, "crime against humanity," of the Indictment. The Tribunal in having accessed that the accused was competent to stand trial, and having heard other statements, accepted Drazen Erdemovic's guilty plea. With the consent of the Parties, the second count, "violation of the laws or customs of war", which had been charged as an alternative to the first was dismissed. In the pre – sentence hearing, Drazen Erdemovic testified, saying:

> ""Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: If you're sorry for them, standing up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me".[221]

The Tribunal was left to consider whether or not the statement had impacted on the guilty plea and whether there existed a defence of superior orders. After consideration, the Trial Chambers of the Tribunal ruled, saying:

> "(14) …. In order to explain his conduct, the accused argued both an obligation to obey the orders of his military superior and physical and moral duress stemming from his fear for his own life and that of his wife and child. In and of themselves, these factors may mitigate the penalty. Depending on the probative value and

220 Ibid at 2.
221 Ibid at 3.

> force which may be given to them, they may also be regarded as a defence for the criminal conduct which might go so far as to eliminate the mens rea of the offence and therefore the offence itself. In consequence, the plea would be invalidated. The Trial Chamber considers that it must examine the possible defence for the elements invoked.
>
> (15). The defence of obedience to superior orders has been addressed expressly in Article 7 (4) of the Statute. This defence does not relieve the accused of criminal responsibility. The Secretary-General's report which proposed the Statute of the International Tribunal and which was approved by Security Council Resolution 827 of 25 May 1993 (S/RES/827 1993) clearly stated in respect of this provision that, at most, obedience to superior orders may justify a reduced penalty "should the International Tribunal determine that justice so requires" (S/25704, para. 57)."[222]

The major issues in this case, the defence of superior orders and duress, and its effect on a guilty plea were taken as a matter for appeal before the Appeals Chamber of the Tribunal. The Tribunal discussed the issues relating to duress and its relationship for a defence of superior orders at length. This correlation will not be addressed in detail; it is necessary only to see what the Tribunal had considered in relation to a defence of superior orders pursuant to the provisions in the Statute. In their separate opinions, Judge Gabrielle Kirk McDonald and Judge Lal Chand Vohrah stated that:

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[222] Ibid at 3 – 4.

> "… Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations. We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out."[223]

In his separate opinion**,** Judge Ninian Stephen, in addressing the issue of duress and defence of superior orders, stated that:

> "… It adverted first to Article 7, paragraph 4, of the Statute of the International Tribunal ("Statute") which states that the existence of superior orders provides no defence but may be a ground for mitigation of sentence. It went on to recognize that if coupled with physical and moral duress these factors might not only mitigate the penalty but "depending on the probative value and force which may be given to them" could also constitute a defence as eliminating "the *mens rea* of the offence and therefore the offence itself". In such a case, it concluded, a plea of guilty would be invalidated. It accordingly turned to an examination of what it described as "the elements invoked".[224]

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223 (Joint separate opinion of Judge McDonald and Judge Vohrah) *The Prosecutor v Drazen Erdemovic* [1997] ICTY1, 15, (7 October 1997) http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojste971007e.htm.

224 (Separate and dissenting opinion of Judge Stephen) *The Prosecutor v Drazen Erdemovic* [1997] ICTY1, 1, 4 - 5, (7 October 1997) http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojste971007e.htm.

In doing so, the Tribunal observed that, unlike the case of superior orders, the Statute provides no guidance regarding the availability of duress as a defence. This is, of course, correct; the Statute does not, with the sole exception of superior orders, advert at all to what defenses are available. It is left to the International Tribunal in the trials it conducts to apply existing international humanitarian law.[225]

One of the important issues that has been addressed in this case arises from the dissenting opinion of Judge Antonio Cassese. It was recognised that there were certain distinctions between superior orders and duress, and arguably no correlation in many respect. There may be incidents where superior orders are issued without any duress, and under such circumstances, the orders issued will undoubtedly be unlawful and the person so ordered is obliged to refuse to follow such orders. What happens if a person refusing to follow an order is threatened to life and limb, does there exist a defence under duress and/ or defence of superior orders? Judge Cassese stated in his opinion that:

> "… Where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb."[226]

It is evident from this decision that there is a general acceptance of a defence of duress. However, a defence of duress arising from obedience to superior orders will arise only if there had been prior objection or refusal to the obedience of unlawful order. It seems that there is no provision for a defence of superior orders *per se* even when acting under duress.

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225 Ibid at 4.

226 Ibid at 13.

3.1.6.1.2. The Case of *the Prosecutor v Darko Mrdja*.[227]

Darko Mrdja was on 13 June 2002 arrested and transferred to the International Criminal Tribunal for the Former Yugoslavia for indictments for serious violations of international humanitarian law. Pursuant to Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Tribunal, in exercising its primacy over national courts, had ordered the transfer of Darko Mrdja to the Tribunal's Detention Unit. The latter was accused of having committed "Extermination as a Crime against Humanity", "Murder as a Violation of the laws or Customs of War" and "Inhumane Acts as a Crime against Humanity"[228] for the following:

> "… On 21 August 1992, Darko Mrdja was a member of the *Prijedor* Police "Intervention Squad". On this day, Darko Mrdja, in his official capacity as a police officer, participated in escorting of an organized convoy of Muslim or non-Serb civilians from *Tukovi* and the *Trnopolje* camp in *Prijedor* towards the municipality of *Travnik*. The convoy consisted of buses and trucks loaded with civilians. At a location on the road along the *Ilomska River*, between *Skender Vakuf* and Mt. Vlasic, the convoy stopped. At this location, Darko Mrdja and other members of the Intervention Squad actively implemented orders to separate military-aged men from the rest of the convoy, including the personal selection of men by Darko Mrdja with the awareness and expectation that these men would be murdered. A large number of men, estimated in excess of 200, were loaded into

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227 *The Prosecutor v Darko Mrdja* [2004] ICTY 5, 1, (31 March 2004) http://www:worldlii.org/int/cases/ICTY/1996/1.html.

228 Ibid at 2.

> two buses. Darko Mrdja and the other members of the Intervention Squad took the separated men in the two buses to *Koricanske Stijene*. The men from one bus were ordered off the bus, escorted to the side of the road above a deep ravine, ordered to kneel, and then shot and killed. The men from the other bus were taken off in smaller groups of two or three and then shot and killed. Together with the other members of the Intervention Squad, Darko Mrdja personally and directly participated in the unloading, guarding, escorting, shooting, and killing of the unarmed men at *Koricanske Stijene*. Except for twelve men who survived the massacre, all of the men from the two buses were murdered."[229]

On 24 July 2003, at the hearing, Darko Mrdja pleaded guilty to Count No. 2 & 3, Murder as a Violation of the laws or Customs of War"[230] and "Inhumane Acts as a Crime against Humanity"[231] of the Indictment. The Tribunal, in having assessed that the accused was competent to stand trial, and having heard other statements, accepted Darko Mrdja's guilty plea. With the consent of the Parties, the first count, "Extermination as a Crime against Humanity",[232] which had been charged was dismissed. In the pre – sentence hearing, it was submitted by the defence that Darko Mrdja was merely following orders, saying:

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229 Ibid.
230 Ibid.
231 Ibid.
232 Ibid.

> "… Darko Mrdja was implementing orders issued by his superiors. He was only one member of the *Prijedor* Police Intervention Squad who implemented orders."[233]

The Tribunal considered the mitigation raised on behalf of Darko Mrdja, and in a unanimous decision said:

> "As to the related issue of superior orders, Article 7 4 of the Statute states that "[t]he fact that an accused person acted pursuant to an order of a government or of a superior […] may be considered in mitigation of punishment if the Tribunal determines that justice so requires." The Trial Chamber notes that the Prosecution does not contest the fact that Darko Mrdja acted in furtherance of his superiors' orders. The Trial Chamber has already stated that there is no evidence that the orders were accompanied by threats causing duress. Moreover, the orders were so manifestly unlawful that Darko Mrdja must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment."[234]

It is quite evident that the International Criminal Tribunal for the Former Yugoslavia had adopted restrictive approach as to the defence of superior orders. The Tribunal had reaffirmed the position of the Statute of the International Criminal Tribunal for the Former Yugoslavia, in that there was no defence relating to superior orders. The

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233 Ibid at 6.

234 Ibid at 10.

compliance to such orders only goes towards mitigation of sentence. The Tribunal was so strict in their approach to defence of superior orders, that even with an associated defence such as duress, the Tribunal prescribed strict conditions that had to be fulfilled before such a defence would be considered. This position is best described by the opinions of Judge Gabrielle Kirk McDonald and Judge Lal Chand Vohrah, when they said:

> "…We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out."[235]

3.1.6.2. The International Criminal Tribunal for Rwanda and the Defence of Superior Orders.

The International Criminal Tribunal for Rwanda was created by the Security Council of the United Nations Resolution 955. The Tribunal was empowered to prosecute individuals who were alleged to have committed serious violations of international humanitarian law in Rwanda between 1 January 1994 and 31 December 1994. The conflict in Rwanda was deemed to be of a non- international nature, however the characteristics of the conflict were such that it was classed as an armed conflict.

The Statute of the International Criminal Tribunal for Rwanda recognised three distinct areas of international humanitarian law that may have been breached. Firstly, Article 2 recognised the commission of genocide. Secondly, Article 3 recognised crimes against humanity. Thirdly, Article 4 recognised violations of the Common Article 3 to the

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235 Ibid at 16.

Geneva Conventions and of the Additional Protocol II.[236] Like the earlier International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, as per Article 1, was empowered to exercise the provided international humanitarian law, irrespective of whether Rwanda was a signatory to these international instruments and had adhered to it by codifying the same in their domestic legislations.[237]

One of the distinguishing provisions of the Statute of the International Criminal Tribunal for Rwanda is Article 6, which is a mirror image of Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia. Article 6 provides as follows:

> "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was

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236 United Nations, "*Statute of the International Criminal Tribunal for Rwanda*", http://www:un.org/ictr/statute.html, 1 – 4.

237 http://www.icrc.org/ihl.nsf. The State of Rwanda was a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, the Four Geneva Conventions of 1949, 12 August 1949, Convention on the Non – Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, Protocol Additional to the Geneva Convention of 1949 (Protocol I and II), 8 June 1977.

about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."[238]

Undoubtedly, Article 6 (4) provides no defence for obedience to superior orders. The only relief is that, in the case of a breach of international humanitarian law, the person can use the defence of superior orders as a mitigating factor for sentencing.

Unlike the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda has not been presented with any submissions relating to defence of superior orders pursuant to Article 6 (4). Of the eleven cases already tried,[239] and some nine cases on appeal,[240] there have been no submissions in this regards. The

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238 United Nations, "*Statute of the International Criminal Tribunal for Rwanda*", http://www:un.org/ictr/statute.html, 5.

239 http://www:un.org/ictr/statute.html, Cases already tried: (1) Akayesu, Jean Paul (ICTR-96-4), (2) Kambanda, Jean (ICTR-97-23), (3) Kayishema, Clément (ICTR-95-I) , (4) Musema, Alfred (ICTR-96-13), (5) Niyitegeka, Eliezer (ICTR-96-14), (6) Ntakirutimana, Gérard (1: ICTR-96-10; 2: ICTR-96-17), (7) Ntakirutimana, Elizaphan (1: ICTR-96-10; 2: ICTR-96-17), (8) Ruggiu, Georges (ICTR-97-32), (9) Rutaganda, George (ICTR-96-3), (10) Ruzindana, Obed (1: ICTR-95-1; 2: ICTR-96-10), (11) Serushago, Omar (ICTR-98-39).

240 http://www:un.org/ictr/statute.html, Cases on appeal: (1) Barayagwiza, Jean Bosco (ICTR-97-19), (2) Gacumbitsi, Sylvestre (ICTR-01-64-I), (3) Imanishimwe, Samuel (ICTR-97-36), (4). Kajelijeli, Juvénal (ICTR-98-44A) , (5) Kamuhanda, Jean de Dieu (ICTR-99-54), (6) Nahimana, Ferdinand (ICTR-96-11), (7) Ndindabahizi, Emmanuel (ICTR-01-71-I), (8) Ngeze, Hassan (ICTR-97-27) , (9) Semanza, Laurent (ICTR-97-20).

only issues raised were pertaining to command responsibilities as provided under Article (1) – (3). There are currently some twenty seven cases in progress[241] some sixteen accused awaiting trial[242] and there are nine accused at large.[243] Whether or not submissions relating to Article 6 (4) are made is to be seen. The likelihood of the same is quite isolated, especially when considering the decisions made by the International Criminal Tribunal for the Former Yugoslavia. The International Criminal Tribunal for Rwanda will probably be more inclined to follow the earlier ruling of International Criminal Tribunal for Former Yugoslavia in that there is no defence afforded relating to a

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241 http://www:un.org/ictr/statute.html, Trial in progress: (1) Bagosora, Théoneste (colonel); (ICTR-96-7), (2) Bicamumpaka, Jérôme (1: ICTR-99-49; 2: ICTR-99-50), (3) Bizimungu, Augustin (ICTR-2000-56), (4) Bizimungu, Casimir (1: ICTR-99-45; 2: ICTR-99-50), (5) Kabiligi, Gratien (ICTR-97-34), (6) Kanyabashi, Joseph (ICTR-96-15), (7) Karemera, Edouard (ICTR-98-44), (8) Mugenzi, Justin (1: ICTR-99-47; 2: ICTR-99-50), (9) Mugiraneza, Prosper (1: ICTR-99-48; 2: ICTR-99-50), (10) Muhimana, Mikaeli (ICTR-95-1), (11) Muvunyi, Tharcisse (ICTR-00-55), (12) Ndayambaje, Elie (ICTR-96-8), (13) Ndindiliyimana, Augustine (ICTR-2000-56), (14) Ngirumpatse, Mathieu (ICTR-98-44), (15) Nsabimana, Sylvain (ICTR-97-29), (16) Nsengiyumva, Anatole (ICTR-96-12), (17) Ntabakuze, Aloys (ICTR-97-30), (18) Ntahobali, Arsène Shalom (ICTR-97-21), (19) Nteziryayo, Alphonse (ICTR-97-29), (20 Nyiramasuhuko, Pauline (ICTR-97-21), (21) Nzirorera, Joseph (ICTR-98-44), (22) Nzuwonemeye, François-Xavier (ICTR-2000-56), (23) Rutaganira Vincent (ICTR-95-1C-I), (24) Rwamakuba, André (ICTR-98-44), (25) Sagahutu, Innocent (ICTR-2000-56), (26) Seromba, Athanase (ICTR-2001-66-I), (27) Simba Aloys (ICTR-01-76).

242 http://www:un.org/ictr/statute.html, Accused awaiting trial: (1)Bikindi, Simon (ICTR-01-72-I), (2) Bisengimana, Paul (ICTR-00-60) , (3) Gatete Jean Baptiste (ICTR-2000-61-I), (4) Hategekimana, Idelphonse (ICTR-2000-55), (5) Kanyarukiga Gaspard (ICTR-2002-78-I) (6) Kareera François (ICTR-01-74-I), (7) Mpambara, Jean (ICTR-01-65-I), (8) Munyakazi, Yussuf (ICTR-97-36A-I), (9) Nchamihigo, Simeon (ICTR-01-63), (10) Nsengimana, Hormisdas (ICTR-2001-69), (11) Nzabirinda, Joseph (ICTR-01-77-I), (12) Renzaho Tharcisse (ICTR-97-31-DP), (13) Rugambarara, Juvénal (ICTR-00-59-I), (14) Rukundo, Emmanuel (ICTR-01-70-I), (15) Setako, Ephrem (ICTR-2004-81), (16) Zigiranyirazo Protais (ICTR-01-73-I).

243 (1) Bizimana, Augustin (ICTR-98-44), (2) Kabuga, Félicien (ICTR-98-44), (3) Mpiranya, Protais (ICTR-2000-56) , (4) Ndimbati, Aloys (ICTR-95-1) , (5) Nizeyimana, Idelphonse (ICTR-2000-55), (6) Ntaganzwa Ladislas (ICTR-96-9), (7) Nzabonimana, Callixte (ICTR-98-44), (8) Ryandikayo (ICTR-95-1), (9) Sikubwabo Charles (ICTR-95-1).

defence of superior orders. A defence of superior orders will be used for the purposes of mitigation of sentences.

From those cases that had been determined by the Tribunal, it was clear that they were more inclined in providing obedience to superior orders for the purposes of mitigation of punishment rather that as absolute defence. These positions have somewhat changed with the codification of the Statute of the International Criminal Court and especially Article 33 relating to the defence of superior orders. In a historical transition, the development and codification of international laws to deal with international armed conflict and grave breaches have been developed. The Rome Statute of the International Criminal Court has been created and vested with:

> "powers to exercise jurisdiction over persons for the most serious crimes of international concerned … and shall be complimentary to national criminal jurisdiction."[244]

The new Statute allows for a defence of superior orders, a provision which had not been allowed for in any international instruments, the Nuremberg Charter, or in any International Criminal Tribunal Statutes. Article 33 of the Statute provides:

> "Superior Orders and prescription of law
>
> 1. The fact that a crime within a jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

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244 International Criminal Court, "*Rome Statute of the International Criminal Court*", (2003), New York in http://www.icc-cpi.int/index/php,1.

(b) The person did not know that the orders was unlawful; and

(c) The order was manifestly unlawful."[245]

Not surprisingly, the Statute has specifically stated that the defence of superior orders does not apply to acts of "genocide and crime against humanity".[246] The compliance to any orders for the commission of genocide and crime against humanity, such acts has been made to be "manifestly unlawful. Despite these standards, arguably, for military operators and others acting under orders, there are now legal provisions that can be drawn upon.

It is appropriate to look at current cases tried by national courts where the obedience to superior orders has been argued. Especially, those cases where the national courts have been asked to address this defence after the codification of the Statute of the International Criminal Court. Some prime examples are the breaches of international humanitarian law in Iraq.

3.1.7. Military Operation in Iraq": Operation Iraqi Freedom"

On March 19 2003 (5:34 AM local time in Baghdad on March 20), the Coalition Forces of the United States of America and the United Kingdom began conducting military operations against the state of Iraq designed to disarm Iraq of its weapons of mass destruction and to remove the Iraqi Regime from power. The military operation is best described by one military site, which says:

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245 Ibid.

246 Ibid.

“The Coalition Forces, using Forces consisting of 40 cruise missiles and strikes led by 2 F-117s from the 8th Fighter Squadron (supported by Navy EA-6B Prowlers) and other aircraft struck strategic positions in Iraq. Less than two hours after a deadline expired for Saddam Hussein to leave Iraq, the sound of air raid sirens were heard in Baghdad. A short time later, President Bush addressed the American public stating that Coalition Forces were in the "early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger." The name of this Operation for British troops is Operation Telic. For Australian Troops involved, it is Operation Falconer.

The military objectives of Operation Iraqi Freedom consisted of, firstly, ending the regime of Saddam Hussein. Secondly, identifying, isolating and eliminating Iraq's weapons of mass destruction. Thirdly, searching for, capturing and driving out terrorists from the country. Fourthly, collecting intelligence related to terrorist networks. Fifthly, collecting such intelligence as was related to the global network of illicit weapons of mass destruction. Sixthly, ending sanctions and immediately delivering humanitarian support to the displaced and to many citizens in need. Seventhly, securing Iraq's oil fields and resources, which belong to the Iraqi people. Finally, helping the Iraqi people create conditions for a transition to a representative self-government.

Operation Iraqi Freedom consisted of the largest special operations force from the United States, the United Kingdom and Australia. In Northern Iraq, the Special

> Operation Forces were assisted by Kurdish fighters (local militia) against the regime. Special Operation Forces were mainly tasked to attack a number of specific targets, such as airfields, weapons of mass destruction sites, and command and control headquarters."[247]

On 1 May 2003, after approximately six weeks of fighting, President George Bush, on board the United States aircraft carrier USS Abraham Lincoln announced the end of major combat operation in Iraq. Out at sea off the coast of San Diego, California, the President remarked:

> " … In this battle, we have fought for the cause of liberty, and for the peace of the world. Our nation and our coalition are proud of this accomplishment -- yet, it is you, the members of the United States military, who achieved it. Your courage, your willingness to face danger for your country and for each other, made this day possible. Because of you, our nation is more secure. Because of you, the tyrant has fallen, and Iraq is free.
>
> Operation Iraqi Freedom was carried out with a combination of precision and speed and boldness the enemy did not expect, and the world had not seen before. From distant bases or ships at sea, we sent planes and missiles that could destroy an enemy division, or strike a single bunker. Marines and soldiers charged to Baghdad across 350 miles of hostile ground, in one of the swiftest advances of

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247 Global Security. Org, "*Operation Iraqi Freedom*", (19 March, 2003), in http://www.globalsecurity.org/military/ops/iraqi_freedom.htm, 1.

> heavy arms in history. You have shown the world the skill and the might of the American Armed Forces.
>
> … The character of our military through history -- the daring of Normandy, the fierce courage of Iowa Jima, the decency and idealism that turned enemies into allies -- is fully present in this generation. When Iraqi civilians looked into the faces of our servicemen and women, they saw strength and kindness and goodwill. When I look at the members of the United States military, I see the best of our country, and I'm honored to be your Commander-in-Chief.
>
> ... Those we lost were last seen on duty. Their final act on this Earth was to fight a great evil and bring liberty to others. All of you -- all in this generation of our military -- have taken up the highest calling of history. You're defending your country, and protecting the innocent from harm. And wherever you go, you carry a message of hope -- a message that is ancient and ever new. In the words of the prophet Isaiah, "To the captives, 'come out,' -- and to those in darkness, be free.""[248]

For the Coalition Forces, the participation in Freedom Iraq has seen certain breaches of international humanitarian laws that have warranted disciplinary proceedings. One recent case in which the defendant argued the defence of obedience to superior orders as one of the reasons behind such abuses and breaches is documented here.

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[248] President George W Bush, Transcript of Speech on board USS Abraham Lincoln on 1 May 2003 http:// www.cnn.com/2003/us/05/01/bushtranscript, 1.

3.1.7.1. The Trial of SPC Charles Graner: The Abu Ghraib Prison Case

The conclusion of the military operation in Iraq saw the collapse of the Saddam Hussein regime and a lapse in law and order. There was widespread looting and street violence, which was out of control. Initially there were no law enforcement officers present to quell or bring the violence to order. After strong objections from the local communities and the adverse image displayed of the coalition forces ability to bring stability, the coalition forces were given directives to arrest and detain looters and other offenders who were responsible for the disorder. The detainees were confined in the infamous *Abu Ghraib* Prison which had been taken over as a United States Military Prison.[249]

The *Abu Ghraib* prison housed different categories of detainees; there were common criminals, security detainees who were involved with or were suspected of committing crimes against the coalition forces and a few prominent leaders of the insurgents operating against the coalition forces. There were several thousand detainees in the Prison including children, women and men, most of them were civilians. In June 2003, Brigadier General Janis Karpinski was appointed commander of the 800th Military Police Brigade. She was given responsibility over three prisons, eight battalions and some 3400 reserve personnel in the mission area. In her interview with the St Petersberg Times, she reported that for many detainees in prison, "living conditions are now better in prison than at home. At one point we were concerned that they wouldn't want to leave."[250] A

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249 Reymour M Hersh, "Torture at Abu Ghraib: American Soldiers brutalized Iraqis. How far up does the responsibility go?", (15 March, 2005) The New Yorker Fact, in http://www.newyorker.com/fact/content/?040510fa_fact, 1

250 Brigadier General J Karpinski, in S T Martin, "*Her job: Lock up Iraq's bad guys*"; (Dec 14, 2003) Petersburg Times, South Pinellas, Edition St., St. Petersburg, Fla., 1.A.

month later, Brigadier General Karpinski was quietly suspended by Lieutenant General Ricardo S Sanchez, the senior commander in Iraq. He then commissioned a major investigation into the prison system in Iraq, headed by Major General Antonio M Taguba.[251]

In his final report which was released in late February 2004,[252] Major General Taguba concluded that between October and December 2003, there were grave breaches of international humanitarian law. Major General Taguba's reported that there were "… numerous instances of sadistic, blatant and wanton criminal abuses at *Abu Ghraib*".[253] He further reported that during the period, the systematic and illegal abuse of the detainees was conducted by servicepersons of the 372nd Military Police Company and members of the American Intelligence Units. General Taguba described the abuse as intentional acts of:

a) Punching, slapping, and kicking detainees; jumping on their naked feet;

b) Videotaping and photographing naked male and female detainees;

c) Forcibly arranging detainees in various sexually explicit positions for photographing;

d) Forcing detainees to remove their clothing and keeping them naked for several days at a time;

e) Forcing naked male detainees to wear women's underwear;

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251 Reymour M Hersh, "Torture at Abu Ghraib: American Soldiers brutalized Iraqis. How far up does the responsibility go?", (15 March, 2005) The New Yorker Fact, in http://www.newyorker.com/fact/content/?040510fa_fact, 2.

252 General A M Taguba, "*Article 16 – 6 Investigation of the 800th Military Police Brigade*", *Abu Ghraib* Report, http://www.npr.org/iraq/2004/prison_abuse_report.pdf, 1.

253 Ibid at 11.

f) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;

g) Arranging naked male detainees in a pile and then jumping on them;

h) Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;

i) Writing "I am a Rapest" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;

j) Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;

k) A male MP guard having sex with a female detainee;

l) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;

m) Taking photographs of dead Iraqi detainees.

(8). In addition, several detainees also described the following acts of abuse, which under the circumstances; I find credible based on the clarity of their statements and supporting evidence provided by other witnesses:

a) Breaking chemical lights and pouring the phosphoric liquid on detainees;

b) Threatening detainees with a charged 9mm pistol;

c) Pouring cold water on naked detainees;

d) Beating detainees with a broom handle and a chair;

e) Threatening male detainees with rape,

f) Allowing a military police guards to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;

g) Sodomizing a detainee with a chemical light and perhaps a broom stick.

h) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee."[254]

The degrading and inhumane treatment of the detainees had been evidenced through statements, photographs and videos taken by service members at the prison. As to the evidence, Major General Taguba reported that:

> "… The allegations of abuse were substantiated by detailed witness statements and the discovery of extremely graphic photographic evidence. Due to the extremely sensitive nature of these photographs and videos, the ongoing CID investigation, and the potential for the criminal prosecution of several suspects, the photographic evidence is not included in the body of my investigation."[255]

As per the findings and recommendation in Major General Taguba's report, a number of United States service people were formally charged for the grave abuse at *Abu Ghraib* Prison. The Court Martial trial of Specialist Charles Graner, described as the "ringleader at the centre of the abuse scandal" is particularly relevant.[256]

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254 Ibid at 11 – 12.

255 Ibid at 11.

256 Nambian World News, "*Abu Ghraib Prison Abuse 'Leader' Jailed*", 17 January, 2005 http://www.nambian.com.na/2005/January/world/058CC2C9DO.html., 1

On 20 March 2004, Specialist Charles Graner was charged under the United States of America, Uniform Code of Military Justice with alleged conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty and maltreatment; maltreatment of detainees; assaulting detainees; committing indecent acts; adultery; and obstruction of justice.[257] On 6 January 2005, the Prosecutors dropped two assault charges, one count of adultery, and one count of obstruction of justice.[258]

During the trial which commenced on 12 January, 2005, one of the defences raised by Specialist Charles Graner's legal counsel was that he was just following orders, saying: "Through all this ... Graner was following orders – being praised for it."[259] This contention was supposedly supported by Private Ivan Frederick, a prosecution witness who testified that Specialist Graner was following orders from high ranking senior officials, saying:

> "A CIA official had told him to "soften up" one insurgent for questioning …. The Agent had told him he did not care what the soldiers did, "just don't kill him"."[260]

Why did the defence of obedience to superior orders crumble? Throughout the trial, Specialist Graner's military attorney, Captain Jay Heath and counsel, Guy Womack argued that Specialist Graner was under a mistaken belief that he was following orders to

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257 Details of Specialist Charles Graner are attached as Appendix 5.

258 FindLaw, "*Preferred Charges against Corporal Charles Graner*", 14 May 2004 in http://news.findlaw.com/hdocs/iraq/graners51404chrg.html, 1 – 5.

259 Guy L Womack, in TR Reid, "*Top Brass Praised Abu Ghraib abuse*", 12 January 2005 Washington Post, Reuters, http://www.theague.com.au/news/iraq/Top-brass-praised-Abu-Ghraib-abuse/2005/01/11/1105423481903.html, 1 – 2.

260 Ivan Frederick, in Reid, TR, "*Top Brass Praised Abu Ghraib abuse*", 12 January 2005 Washington Post, Reuters, http://www.theague.com.au/news/iraq/Top-brass-praised-Abu-Ghraib-abuse/2005/01/11/1105423481903.html, 1.

"soften up"[261] detainees for intelligence purposes through physical abuse and sexual humiliation, prior to their interrogation by Other Government Agencies, including the CIA and its paramilitary employees brought to the Unit for questioning.

The Defence encountered two major hurdles in its presentation. The first was the testimony of the witnesses to the abuse and humiliation suffered by the detainees in the prison. Evidence was produced that at the time of the alleged abuse of the detainees, there were no intelligence persons present and they had not ordered any abuse in the prison. The Defence of Specialist Graner found it difficult to get prosecution witnesses to admit that military intelligence personnel were present and had ordered the abuse. The task was made more difficult in that their own defence witness failed to acknowledge the presence of such military intelligence personnel. Sergeant Henry Lugan Jnr of the 72nd Military Police Company, appearing as a defence witness testified that he never saw military intelligence agents interrogate detainees inside the prison.[262] Like Sergeant Lugan, the defence witnesses seemed to favor the prosecution's case more. The failure to get witnesses to testify that there was the presence of an external superior order that caused the abuse became the first major obstacle in arguing the obedience of superior orders as a defence.

Secondly, obedience to a superior order is codified as a defence in the Manual for Courts Martial United States. Rule 916 (d) provides:

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261 M A Fuoco, "*Graner's defense sputters: witness seem to bolster prosecution*", 13 January 2005 http://www.post-gazette.com/pg/05013/441510.stm, 1

262 Ibid.

> "… It is a defence to any offense that the accused was acting pursuant to orders unless the accused knew that the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[263]

For Specialist Graner, there was available to him a defence that his conduct was based on the obedience to superior orders, provided he could meet the requirements provided in Rule 916 (d). Specialist Graner in his defence maintained that: "Through all this, the accused was following orders".[264] The first part of rule 916 (d) was easily satisfied; however, the difficulty arouse with the elimination of the additional proviso provided by Rule 916 (d), which provided that: "unless the accused knew that the orders to be unlawful or a person of ordinary sense and understanding have known the orders to be unlawful."[265] This condition was a hurdle which Specialist Graner's Defence failed to overcome. The Court in accepting the views expressed by the Chief Prosecutor, Major Michael Holly that:

> "Following orders was not a valid defence…. Guards at *Abu Ghraib* were in a chaotic environment, marked by training problems, leadership problems,… but prisoner abuse was not legal, even if ordered by superiors. Anyone who says, That's illegal, that can't be right."[266]

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263 Manual for Courts Martial United States (2002 Edition) http://www.usapa.army.mil/pdfiles/mcm2002.pdf, II - 111

264 Guy L Womack, in TR Reid, "*Top Brass Praised Abu Ghraib abuse*", 12 January 2005 Washington Post, Reuters, http://www.theague.com.au/news/iraq/Top-brass-praised-Abu-Ghraib-abuse/2005/01/11/1105423481903.html, 1 – 2.

265 Manual for Courts Martial United States (2002 Edition) http://www.usapa.army.mil/pdfiles/mcm2002.pdf, II - 111

266 M Holley, in TR Reid, "*Top Brass Praised Abu Ghraib abuse*", 12 January 2005 Washington Post, Reuters, http://www.theague.com.au/news/iraq/Top-brass-praised-Abu-Ghraib-abuse/2005/01/11/1105423481903.html, 2.

The case of Specialist Graner is important, in that it highlights that United States Military Courts continue to address the issue of obedience to superior orders with caution. This very issue was a major obstacle in getting states to agree to the International Criminal Court Statute and its jurisdiction. There seem to be reluctance by the United States in endorsing the Statute until provisions are made for the defence of superior orders under domestic laws and the right under Article 33 of allowing trials before their national court.[267] The next Chapter will re-examine the different standards and conditions imposed for a defence of superior orders.

3.1.8. Conclusion.

In this chapter, it has been a deliberate choice to rely extensively on historic examples of the trials relating to and the defences of 'obedience to superior orders'. Perhaps contrary to common beliefs, these examples have demonstrated a broad acceptance of the principles restricting the conduct of war, personal responsibilities for exceeding those limitations, and the legal processes for imposing penal sanctions against those convicted of such atrocities. Most importantly, the examples also show that the principles were acknowledged and applied across cultural, religious and linguistic divides. The broad acceptance of these principles in varying jurisdictions and an international acceptance through the International Criminal Court and Tribunals were fundamental to the

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267 Amnesty International , "Report on the September 2005 draft legislation to implement the obligations under the Rome Statute of the International Criminal Court", (Feb., 2006), in http://www.amnesty.org/en/alfresco_asset/879a65a8-a2c2-11dc-8d74-6f45f39984e5/afr620042006en.html, 1.

development of international humanitarian law, and in particular the responsibility of commanders and individuals in armed conflict.

Undoubtedly, the defence of superior orders has been provided in all national laws; especially, military laws. However, the application of such provisions has been very restrictive in nature. The qualification imposed as to the invoking of such a defence is stringent. As witnessed, there is a readiness amongst Courts to accept a defence of superior orders as a mitigating factor rather than an absolute defence.

The International Tribunals established under the auspices of the United Nations have not been seen to favor a defence of superior orders. Rather, such a defence is seen as a mitigating factor to sentencing. The newly established International Criminal Courts is more inclined to the defences afforded under national jurisdictions. However, the defence of superior orders is restrictive in that, there is no defence available for a 'crime of genocide or crime against humanity'.

The concern that arises from all this is, despite the development of international humanitarian law, the number of cases where grave atrocities have been committed has increased. Since Nuremberg, some 280 million people have been affected by these atrocities,[268] and yet, we hear again and again the plea as a defence, 'the obedience to a superior order'. As early as this year during the "*Abu Ghraib Trials*" this defence was echoed. Why is this happening? Are the current laws inadequate and unclear? Are the

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[268] Joseph Rudolph Rummel, "*Democide (Genocide and Mass Murder*) since 1945", in http://www.mega.nu:8080/ampp/rummel/postwwii.htm., 3 - 56.

current military doctrines and manuals inadequate and of no significant help? Is the defence obedience to superior orders raised as merely a smoke screen to camouflage the atrocities and shift blame to avoid punishment? These and many more questions arise as the evolution of international humanitarian law and the constraints it imposes on warfare are considered.

Chapter 4

The Defence of Superior Orders: Case Analysis.

"*The Killing Fields*",

http://www.downtheroad.org/Asia/Photo/2Cambodia_Pictures/a10killing_field.htm, 1.

"The way of the superior man is like that of the archer. When he misses the centre of the target he turns and seeks the cause of his failure in himself"[269]

4.0. Introduction.

This paper has so far looked at the development of the defence of superior orders, its application both in national and international courts and tribunals, and has discussed the availability of such a defence and the standards imposed to successfully invoke the same. There were three principles that a soldiers needed to recognise when addressing the issue

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269 Confucius, "*The Analects of Confucius*", Arthur Waley Translation, (1938) The McMillian Company, New York, 83.

of superior orders, being: to determine whether or not the order issued was from a responsible superior, did he know that the order was unlawful and whether the order was manifestly unlawful. Also, we have identified areas where improvements could be made, in terms of how we could assist and allow soldiers a better opportunity for deciding whether an order is lawful or not and what should be done.

This Chapter analyses one case where breaches of international humanitarian law had been commissioned and a defence of obedience to superior orders was argued. We will evaluate the current standards imposed as to how soldiers could better their choices in deciding whether or not to follow an order. Also, we intend to propose alternatives which could enable soldiers to have more options in their choices and decisions. A real case study from as early as the Vietnam War has been chosen. I hope that the selection of this case will enable me not only to draw a cross reference to the different situations, orders and compliance; but more importantly, to develop a realistic example for soldiers in deciding what to do or not in such circumstances.

In analyzing this case study, I do not intend to focus so much on the proceedings that transpired and the final decision of the case, rather, to draw out lessons to be learnt. We hope that this case can teach us as to how best we can avoid the mistakes and atrocities previously experienced. These lessons have come with a price; numerous lives have been lost and sacrifices made. For many victims, the recollection of the past and its memories are too painful and unimaginable. However painful it may be, it is important to teach and inculcate the lessons in soldiers, so that the same never happens again.

4.1. The My Lai Massacre: Case Analysis.

The *My Lai* massacre in modern history serves as a classic reminder of the horror of war but most importantly a lesson of how under the disguise of obedience to superior orders, innocent people were slaughtered. The end result of this case was disappointing, for no one person responsible for committing these atrocities fully served the sentence awarded for their criminal act. However, lessons should be learnt from this case so that no such acts ever occur again.

4.1.1. Facts of the *My Lai* Massacre.

"*My Lai 4: A Report on the Massacre and Its Aftermath*", (1970) Random House, New York, 48-75, in http://www.thenausea.com/elements/documents/my%20lai/my%20lai.html.

During the period 16-19 March 1968, a tactical operation was conducted into *Son My* Village, *Son Tinh* District, *Quang Ngai* Province, Republic of Vietnam, by Task Force Barker, a battalion-sized unit of the American Division. Task Force Barker was an

interim organization of the llth Brigade,[270] created to fill a tactical void resulting from the withdrawal of a Republic of Korea Marine Brigade from the *Quang Ngai* area. The Task Force was composed of a rifle company from each of the llth Brigade's three organic infantry battalions; the A/3-1, B/4-3 and C/1-20 Infantry. The commander was Lieutenant Colonel Frank A. Barker. The plans for the operation were never reduced to writing but it was reportedly aimed at destroying the 48th Viet Cong Local Force Battalion,[271] thought to be located in *Son My* Village, which also served as a Viet Cong staging and logistical support base. On two previous operations in the area, units of Task Force Barker had received casualties from enemy fire, mines, and booby traps, and been able to close effectively with the enemy.[272]

On 15 March 1968, the new llth Brigade commander, Colonel Oran K. Henderson, visited the Task Force Barker command post at Landing Zone *Dottie* and talked to the assembled staff and commanders. He urged them to press forward aggressively and eliminate the 48th Local Force Battalion. Following these remarks, Lieutenant Colonel

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270 Attached as Appendix 6 the United States Army 11th Division chain of command.

271 Viet Cong (Việt Cộng) was a name used by South Vietnamese and allied soldiers in Vietnam, as well as by much of the English language media to refer to the armed insurgents and political dissidents fighting against the Republic of Vietnam during the Vietnam War. The name was derived from a contraction for the Vietnamese phrase *Việt Na m Cộng Sản*, or "Vietnamese Communist." The primary group covered by the term is the guerrilla army formally named the People's Liberation Armed Forces (PLAF), the military of the National Front for the Liberation of Southern Vietnam (Vietnamese Mặt Trận Giải Phóng Miền Nam Việt Nam) or National Liberation Front (NLF). In areas under its control the NLF also included many non-military cadres, including villages chiefs, village clerks, and school teachers. Many consider the term Viet Cong fairly derogatory, although its widespread use in the United States and Europe since the Vietnam War has made the term better known than the proper name of the NLF. http://www.nationmaster.com/encyclopaedia/Viet-Cong.html.

272 Richard Hammer, "*The Court Martial of Lt Calley*", (1971) McCann & Geoghegan, Inc, Coward, New York, 1 - 16.

Barker and his staff gave an intelligence briefing and issued an operations order.[273] The company commanders were told that most of the Population of *Son My* were Viet Cong or Viet Cong sympathizers and were advised that most of the civilian inhabitants would be away from *Son My* and on their way to market by 0700 hours. The operation was to commence at 0725 hours on 16 March 1968 with a short artillery preparation, following which C/1-20 Infantry was to combat assault into an Landing Zone immediately west of *My Lai* (4) and then sweep east through the subhamlet. Following C Company's landing, B/4-3 Infantry was to reinforce C/1-20 Infantry, or to conduct a second combat assault to the east of *My Lai* (4) into a Landing Zone south of the subhamlet of My Lai (1) or "Pinkville." A/3-1 Infantry was to move from its field location to blocking positions north of *Son My*.[274]

The key military persons involved in the mission were: American Division commander: Major General Sam Koster; Deputy Divisional Commander, Brigadier General George H. Young; 11th Infantry Brigade Commander, Colonel Oran K. Henderson; Task Force Commander, Lieutenant Colonel Frank Barker; C Company Commander, Captain Ernest "Mad Dog" Medina; Platoon Commander for the First Platoon, 1LT William "Rusty" Laws Calley.[275] The task force was named after its commander, Lieutenant Colonel

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273 Attached as Appendix 7 is the Assault Plan for the My Lai Operation.

274 Richard Hammer, "*The Court Martial of Lt Calley*", (1971) McCann & Geoghegan, Inc, Coward, New York, 5 – 22.

275 Attached as Appendix 8 is the outlay of the My Lai hamlets.

Frank Barker. The Area of Operation was code named "Musacatine," a name chosen by Major General Koster representing a home town in Iowa.[276]

My Lai is the name given to several sub-hamlets falling within certain proximity of each other. The hamlet of *My Lai* was marked on American maps as consisting of *My Lai* 1 through *My Lai* 6, *Binh Tay*, and *Trung An*. The massacres at *My Lai* actually occurred at *Tu Cung*, one of these sub-hamlets. *Tu Cung*, *Truong Dinh*, and other sub-hamlets, were collectively marked on American maps as *My Lai 4*. Attached as Appendix 5 is a map outlining the disposition of these hamlets. To further complicate matters, *Tu Cung* had a number of sub-sub-hamlets, two of which are *Binh Tay* and *Binh Dong.*[277]

To maintain an element of surprise, C Company was to land by helicopter at 0730 hours and begin to move east through the hamlet of *My Lai*. Later B Company would be ferried to another landing field on the coast, south of *My Lai* 1, near the River *My Khe*. Again, the whole of *Son My* Village was the target for Task Force Barker over a period of three days. Lieutenant Colonel Baker's plan initially provided for two platoons to sweep through the hamlet, quickly taking out any enemy opposition they encountered. A third Platoon was to come in behind the others half an hour later, for the purpose of mopping up, killing the livestock, and burning houses. Captain Medina and his command group would direct operations from the rear.[278]

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276 Jeffery H Addicot, & William A Hudson, "The twenty – Fifth Anniversary of My Lai: A Time to Inculcate the Lessons", (Winter, 1993) 139 *Military Law Review*, 1 – 8.

277 Tony Raimondo, "*The My Lai Massacre: A Case Study*", http://www.fsa.ulaval.ca/personnel/vernag/EH/F/cause/lectures/my-lai.htm. 2 – 3, 5.

278 Ibid at 4 – 5.

Leaving the briefing the Task Force officers believed that Lieutenant Colonel Barker had ordered the destruction of all the houses, dwellings, and livestock in the *My Lai* area. However, there was no evidence that Lieutenant Colonel Baker had ordered any acts against the local population. This was a major contention through out the inquiry and trials of the soldiers implicated in the massacre. There were factors which arguably suggested that although there were no orders given to kill civilians, it was assumed from the orders that such was to happen. The intelligence information that the civilians had gone to market, the village was entirely controlled by Viet Cong, the people had been previously warned to get out, and the use of direct artillery and gunship fire on the village seemed to suggest that everything was to be destroyed, including the locals.

On his return, Captain Medina briefed his officers by drawing a map of My Lai 4 on the ground with a shovel. The plan of the operation, search and destroy was explained. In his orders, Captain Medina briefed that the 48th Viet Cong Battalion was in *My Lai* 4 with a strength of 250 to 280, and that C Company would be outnumbered more than two to one. The company was further told that their operation would have the support of direct artillery fire and helicopter gun ships. Concerning the most crucial information for the mission, it was stated that all local civilians would be gone to market, leaving only the Viet Cong to fight.[279]

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279 Ibid at 17.

One important aspect of Captain Medina's orders was that he was questioned on what was to happen to civilians in the village. He was specifically asked: "Do we kill women and children?"[280] Captain Medina during his trial had testified that his reply was:

> "… no, you do not kill women and children. You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use your common sense."[281]

Although on the face of it, this instruction regarding the handling of civilians looked plain, simple and conclusive; in the eyes of the soldiers it was much different. This as we shall discuss later was a crucial factor as to how soldiers were to behave and conduct their operation.

The account of the *My Lai* massacre as it unfolded the next morning is well documented by Raimondo,[282] detailing the activities he writes:

> "… 16 March 1968:
>
> 0530 The soldiers of C Co. are instructed to gather their gear, and prepare for boarding the aircrafts. More than a hundred soldiers and several tons of equipment were to be transported from LZ Dottie to the landing field, a trip of approximately 11 miles.

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280 *United States v Captain Ernest Medina* (1971) 427 CM 162 ACMR

281 Ibid.

282 Tony Raimondo, "*The My Lai Massacre: A Case Study*", http://www.fsa.ulaval.ca/personnel/vernag/EH/F/cause/lectures/my-lai.htm. 1, 4 - 14.

Nine (9) lift ships (radio call sign "Dolphins") and gunships (radio call sign "Sharks") from the 174th Helicopter Assault Co. were to provide support.

The "Slicks," the troop-carrying helicopters, were to move C Co. in two lifts. First, they would take CPT Medina's command group, the 1st PLT, and as many soldiers from 2nd PLT as possible (a total of approximately fifty troops). The plan called for this element to secure the landing field for the remainder of the company. The remainder of 2nd PLT, and 3rd PLT, along with a few additional elements from other brigade units temporarily assigned to C Co. for the Pinkville operation, were to be transported on the second lift.

0730 An artillery barrage from four 105-mm guns began. It lasted approximately three minutes, and landed about 120 rounds around the landing area near the My Lai hamlet. The purpose was to clear it of enemy presence/prepare it for landing. Eventually some of the rounds strayed over into the inhabited part of the hamlet itself, creating flying shrapnel and causing terror and panic amongst the civilian population. The artillery barrage degenerated to blind firing since no spotter was close enough to adjust the fire away from the village. Nevertheless, only one villager was killed by it.

The first lift (again, carrying CPT Medina's command group, 1st PLT, and some members of 2nd PLT), took a circuitous route to keep the element of surprise. The VC may have known that an attack was imminent because of the leaflets, but they did not know where the attack would originate. The aircrafts, as they drew near the landing field, poured down a heavy fusillade of machine gun fire, with tracer

rounds, on the landing area. These approximately 50 troops, once on the ground, immediately spread out to take defensive positions at the bank of a near-by irrigation ditch. They held their defensive positions, and provided covering fire while waiting for the rest of the 2nd and 3rd PLTs to join them. These soldiers, and the aircrafts that transported them, received no enemy fire.

The "Dolphins" took off again and the leadership announced over the air that the landing field was "cold" -- i.e., that there had been absolutely no enemy fire. Nevertheless, the "Sharks" continued pouring all kinds of fire on the outskirts of the hamlet with machine guns, grenade launchers, and rockets. LTC Barker acknowledged the message from "Dolphin Lead," and relayed it back to the operations center at LZ Dottie. LTC Barker was in his command-and-control aircraft, the "Charlie Charlie" ship, manning a console of radios that allowed him to be in contact with his ground troops and the several aircrafts, the gunships in particular. Task Force Barker’s tactical operations center was located at LZ Dottie; whereas, operations for brigade headquarters were located at Duc Pho, in the southernmost part of Quang Ngai Province, to the south of LZ Dottie.

There was intense aerial activity for the next twenty minutes, as the aircrafts continued searching for signs of enemy positions. None were found. A farmer standing in one of the many paddy fields surrounding the hamlet, frantically raised his hands so as to show that he had no weapons. Nevertheless, he was immediately struck by a burst of machine gun fire. This may very well have been the first casualty and unlawful killing of the day.

The second lift did not require a circuitous route, since the element of surprise was no longer a factor (after the first lift), and therefore had a much shorter journey cross country to the landing field. These soldiers as well, shortly after the second lift reached the landing field, quickly spread out to take up defensive positions with the others. They too engaged in covering fire even in the continued absence of enemy fire.

A squad from 3rd PLT was tasked to retrieve a VC weapon spotted, and marked with a smoke canister, by one of the aero scouts. A woman carrying a small child in the brush some distance away was shot at by a soldier from 3rd PLT, with his weapon on full automatic, shortly after being spotted. His squad leader angrily reprimanded him for firing in the direction of the soldiers searching for the VC weapon. The rampage was about to begin.

At this time, while still having received no enemy fire whatsoever, almost everyone in the 1st, 2nd, and 3rd PLTs was firing their weapons, along with the gunships. The moment a Vietnamese was spotted, and regardless of status, volleys of fire were sprayed off, and the "enemy" felled either wounded or dead.

0750 1st and 2nd PLTs started moving into the hamlet in separate groups. Spread out "on line" (a then typical infantry formation under such circumstances), they moved forward, over a dike, through another rice paddy, and entered the village firing methodically from the hip. Again, many soldiers had their M-16s on full automatic. CPT Medina’s command group, along with 3rd PLT, in accordance with the operational plan, remained behind in a defensive perimeter on the

western edge of the hamlet, approximately 150 meters from the tree line that separated the hamlet from the rice paddies.

0800 CPT Medina radioed the operations center via the "Charlie Charlie" ship of the task force commander and reported that they had fifteen confirmed "VC" kills. Apparently, the soldiers of C Co. viewed every single Vietnamese villager in My Lai as a VC combatant and therefore a lawful target, regardless of their actions or behavior on the field.

1LT Calley's 1st PLT entered the southern portion of My Lai 4 in three separate squads, line abreast. Part of the plan was for prisoners or Viet Cong suspects to be sent back to the PLT commanders, including 1LT Calley, for screening.

Soldiers soon began firing on anything that moved (including farm animals, such as pigs, chickens, ducks, and cows). Troops yelled inside small dwellings for its inhabitants to come out, using hand signals to direct them if they appeared outside. If there was no answer, they threw grenades into the shelters and bunkers. Many soldiers did not bother to use this procedure and threw hand grenades inside the hootches regardless of human presence. Small clusters of people were being gathered, in one part of the hamlet, into one larger group of fifty or sixty old men, women, and children. Some were mothers with babies in their arms, and some so badly wounded they could hardly walk. This group of Vietnamese villagers is the same group discussed later in this outline under the heading: "The First Large Scale Atrocity -- On the Main Trail Leading into the Village.

Minutes after entering My Lai, a soldier came across a hut which had been strafed with bullets. Inside, he discovered three children, a woman with a flesh wound in her side, and an old man squatting down, hardly able to move because of serious injuries he had sustained to both legs. The soldier aimed his .45 pistol at the old man's head and pulled the trigger, causing the top of his skull to be severed. The soldier later claimed to have shot the old man as an act of mercy.

Two soldiers were taken by surprise when a woman, carrying an infant in her arms and with a toddler barely able to walk not far behind, came running out of a bamboo hut. One of them fired and injured her. An elderly woman, with an unexploded M-79 grenade lodged inside her open stomach, was spotted staggering down the path.

An old man with a straw coolie hat and no shirt (making it obvious that he was unarmed) was with a water buffalo in a paddy 50 meters away. He was shot, immediately after placing his arms up, by members of 1st PLT as 1LT Calley watched.

One soldier stabbed a middle aged Vietnamese farmer with his bayonet for no apparent reason. Then, while the victim was on the ground gasping for breath, the soldier killed him. This same soldier then grabbed another man that was being detained, shot him in the neck, threw him inside a well, and lobbed an M-26 grenade after him.

The shooting, once it began, created almost a chain reaction. Inside the hamlet, soldiers appeared out of control. Families who had huddled together for safety inside houses, in their yards, and in bunkers, were mercilessly mowed down with automatic weapon fire or blown apart by fragmentation grenades. Some women along with their children were forced inside bunkers and grenades thrown in after them.

One soldier who had wandered off on his own, found a woman about age 20 with a four-year-old child. He forced her to perform oral sex on him while he held a gun at the child's head, threatening to kill the child. When 1LT Calley happened along, he angrily told this soldier to pull up his pants and get over to where he was supposed to be.

At one point, amid all the mayhem, the 1st and 2nd PLTs overlapped when the right flank of 2nd PLT crossed paths with the left flank of 1st PLT. Troops from 1st PLT who were walking back a small group of villagers for screening were accosted by a soldier from 2nd PLT who angrily insisted that the villagers be killed on the spot. He solicited an M-16 in exchange for his M-79 so that he could initiate the executions. When this was refused, he grabbed an M-16 from a soldier and shot a Vietnamese farmer in the head. He was later calmed down.

0830 COL Henderson and LTC Barker flew back to the area of operation briefly in their respective helicopters. LTC Barker checked once more with CPT Medina

to find out how the operation was going. CPT Medina reports 84 enemy killed, and LTC Barker then relayed the additional 69 KIA to the tactical operations center. The death toll turned out to be far higher. Bear in mind that still no shots had been fired at any member of C Co., and they had yet to kill a single enemy soldier.

Apparently, LTC Barker was flying back and forth amongst his three companies. B Co. was conducting operations in Co Luy. The Peers Commission would later discover that B Co. massacred approximately ninety to one hundred civilians in the hamlet of Co Luy. The Massacre at Co Luy has been overshadowed by the My Lai Massacre because the latter posted a much higher number of victims, between 400 to 500. To this day we do not have an accurate total because of the inadequate initial investigations into the massacres.

Three squads of 2nd PLT soldiers approached line abreast emptying dwellings and then tossing fragmentation grenades inside. Homes were also sprayed with automatic fire. A group of children aged only 6 or 7 who came towards them were quickly mowed down. Another group of Vietnamese was killed (by machine gun fire, and M-16s on full automatic) in front of a hut, after they had huddled together for safety. One squad leader told his men that he didn’t like what they were doing, but that he had to follow orders.

A soldier shot at a woman with a baby at a distance of approximately 25 meters. Her right arm almost came off. A fragile piece of flesh was all that held it. She ran

into a hootch while still clutching her baby; someone yelled for both of them to be killed.

A middle aged woman while attempting to climb out of a tunnel using both hands (thereby clearly revealing that she was unarmed), was shot by a machine gun team. This same machine gun team opened fire on any Vietnamese they came across. The scene continued to be one of chaos and confusion, with people running and screaming. Some of the troops became concerned that they would be shot by their fellow soldiers.

In a clearing near a small hootch, a group of fifteen Vietnamese had been gathered, four women in their thirties, three in their fifties, three girls in their late teens, and five children with ages of 3 to 14. A soldier yelled out a warning for anyone behind the group of Vietnamese to take cover because they were going to open fire. The very first shot that was fired at this group penetrated the head of a young child being carried by its mother, blowing out the back of the skull. Others then began firing as well; no one stopped until the entire group was dead.

One soldier fired two grenades, from his M-79 grenade launcher, at a number of Vietnamese sitting on the ground. The first bomb let missed, the second landed among them with devastating impact. Nevertheless, some of them managed to survive the blast. Another soldier finished off those left alive. A third soldier stooped over a tunnel and yelled for its occupants to come out. The people were about to comply when he threw in a grenade anyway.

Behind the 1st and 2nd PLTs, CPT Medina's command group had formed a security line out in the paddy fields beyond the western perimeter of My Lai 4. Some forty-five minutes had elapsed since the first troops entered the village and CPT Medina was waiting to send in 3rd PLT.

CPT Medina's intent, in keeping with LTC Barker's operational plan, was to clear the hamlet by sending in a sweep team through very rapidly, "clearing" people out of the hootches as quickly as possible. The search teams would then go from hootch to hootch, checking bunkers and tunnels looking for any enemy who might be hiding. Then the soldiers of 3rd PLT were to act as "Zippo" squads and burn the village. What was meant by "clearing" was the part that caused problems during the operation.

THE FIRST LARGE SCALE ATROCITY - ON THE MAIN TRAIL LEADING INTO THE VILLAGE.

My Lai 4: A Report on the Massacre and Its Aftermath, (1970) Random House, New York, 48-75, in http://www.thenausea.com/elements/documents/my%20lai/my%20lai.html.

1st PLT collected a large group of about fifty to sixty Vietnamese. Among the squatting Vietnamese were ten to fifteen men with beards and ten women, as well

as a handful of very elderly, gray-haired women who could hardly walk. The rest were children of all ages -- from babies up to early teens.

By this time (from the time his PLT entered the hamlet), 1LT Calley had already received two radio calls from an anxious CPT Medina, who demanded to know what was happening with his platoon and challenging their slow progress through the hamlet. 1LT Calley replied that a large group of Vietnamese they had gathered was slowing down the platoon. CPT Medina instructed him to "get rid of them." 1LT Calley approached the two soldiers guarding the group of civilians and told them to "take care of them." The two soldiers responded "OK."

When 1LT Calley returned, several minutes later, he said to the two soldiers: "I thought I told you to take care of them." One of them responded: "We are. We’re watching over them." 1LT Calley retorted that that was not what he had meant, and that he wanted them killed. "We’ll get on line and fire into them. Fire when I say fire." One of the soldiers refused by offering the excuse that he was carrying a grenade launcher and did not want to waste ammunition. (By the way, this is the same soldier that 1LT Calley had caught with his pants down; the same one that had earlier threatened the life of a child at gun point if the mother did not perform oral sex on him.)

The other soldier participated in the killing with 1LT Calley, but could not take any more and stopped shooting towards the end, with tears streaming down his face. At this point the soldier who had not participated saw that only a few children remained alive. Mothers had thrown themselves on top of the young

children in a last desperate attempt to shield them with their own bodies from the constant shower of bullets. The young children were trying to stand up. 1LT Calley opened fire killing them one by one. 1LT Calley then said "OK, let's go."

THE SECOND LARGE SCALE ATROCITY - AT THE IRRIGATION DITCH

My Lai 4: A Report on the Massacre and Its Aftermath, (1970), Random House, New York, 48-75, in http://www.thenausea.com/elements/documents/my%20lai/my%20lai.html

Ten members of 1st PLT were guarding forty to fifty Vietnamese at an irrigation ditch.

While 1LT Calley was questioning a Buddhist monk through an interpreter, a child approximately two years of age somehow managed to crawl out of the ditch unnoticed by the soldiers. 1LT Calley walked over, picked up the child, shoved the child back into the ditch, and then fired at the child, before returning to question the monk. Tired of questioning the monk, 1LT Calley pulled him round, hurled him into the paddy, and opened fire with an M-16.

In the meantime soldiers continued to escort and force the Vietnamese villagers into the irrigation ditch. Some were pushed, while others were butted; some Vietnamese jumped in by themselves; and yet others remained sitting at the edge, wailing because it was clear to them that, once inside the ditch, disaster was imminent. After 1LT Calley shoved a wounded woman into the ditch, he turned to one soldier and ordered: "Load your machine gun and shoot these people." When the soldier responded "I’m not going to do that," 1LT Calley pointed his M-16 on the soldier as if threatening to shoot him on the spot. The standstill came to an end when 1LT Calley backed off after some other soldiers intervened.

1LT Calley and other soldiers, one of whom was the same soldier that had earlier broken down and cried, after participating in the first large scale atrocity in the village, fired into the irrigation ditch. The Vietnamese tried frantically to hide under one another, mothers once again desperately attempted to protect their young children (and babies) by covering or shielding them with their bodies. The remnants of shredded human flesh and pieces of broken bone flew through the air, as magazine after magazine was emptied into the shallow ravine.

0845 CPT Medina heard all the shooting and was briefly concerned that his soldiers had encountered heavy enemy resistance. However, this was not the case, it had never been the case, and was never to be the case, in the hamlet of My Lai. Again, members of C Co. never received any enemy fire whatsoever. The 3rd PLT was sent in, according to plan, to mop up. They killed every animal they found - sometimes deliberately wounding pigs and water buffaloes, for the

pleasure of watching them writhe in agony. Hootches were set on fire, and grenades thrown into holes in the ground.

Two wounded children, with an estimated age of five and eight, were seeing running while crying. One soldier shot them both in the chest and shoulders. When asked why he had killed them, the soldier replied: "Because they were already half-dead." A man and woman were also shot dead while running down the trail from the village. Some soldiers went around finishing off the wounded; it took three shots to kill one wounded victim with two bullet holes in her back.

After 3rd PLT moved out of their defensive positions around the landing zone, CPT Medina's command group moved across a paddy field and an irrigation gully toward the southernmost portion of the village. At one point CPT Medina fired twice and wounded a woman holding a small wicker basket in a paddy. CPT Medina approached the injured woman, searched the wicker basket, found syringes and other medical supplies, and then proceeded to shoot her twice in the head.

CPT Medina entered the hamlet and shortly thereafter was confronted, near a pile of bodies, by a Vietnamese SGT (an interpreter). The Vietnamese SGT confronted CPT Medina as to why so many civilians had been killed. CPT Medina replied: "Sergeant Minh, don't ask anything -- those were the orders." It was evident that CPT Medina's control over his soldiers had been negligible from the time he first landed.

1100 LTC Barker was notified by his tactical operations center that several pilots had reported to their company commander that innocent civilians were being murdered. LTC Barker quickly notified by radio his executive officer, who had been flying over the battle zone, with instructions to find out what was happening, and that if the reports were true to get it stopped immediately. LTC Barker wanted assurances from CPT Medina that nothing of the kind had happened. Shortly thereafter, the cease-fire order was issued to C Co.

The dead and dying were seen everywhere. The vast majority of the bodies presented extremely gruesome scenes. In one such scene, a group of seven women aged between 18 and 35, were found lying naked with tiny dark holes dotted all over their bodies."[283]

4.1.2. Analysis of the My Lai Massacre.

In this analysis, the criteria currently advocated as the basis of determining the defence of superior orders will be adopted; the three major factors needed to fulfill the conditions being:

(a) the person must be ordered by a superior or person of authority;

(b) the person did not know the order was unlawful; and

(c) the order did not manifest itself to be unlawful.

For ease, I shall make reference to three events, Firstly, the issue of the orders by Captain Medina a day before the actual operation and the second order by First Lieutenant Calley

283 Ibid at 1 – 26. (Extracts from United States v. First Lieutenant William L. Calley, Jr, Vol 46, Court-Martial Reports, USAWC, 21 May 1974. UB856C3A3.)

to shoot the civilians at the main trail leading into the village, and finally the orders to kill at the irrigation ditch. With reference to these incidents, the three conditions for the defence of superior orders will be examined and whether any such defence flows from the obedience to such orders. Factors that could have been improved to avoid the massacre at *My Lai* will then be proposed.

4.1.2.1. Captain Ernest Medina's Orders: Massacre at *My Lai*

Captain Medina briefed his officers of the operation, a search and destroy mission. In his orders, Captain Medina briefed that the 48th Viet Cong Battalion was in *My Lai* 4 with a strength of 250 to 280, and that C Company would be outnumbered more than two to one. The company was further told that their operation would have the support of direct artillery fire and helicopter gun ships. Concerning the most crucial information for the mission, it was stated that all local civilians would be gone to market, leaving only the Viet Cong to fight. In regard to civilians caught in the village and questioned of what was to happen to them; he was specifically asked: "Do we kill women and children?"[284] Captain Medina during his trial testified that his reply was:

> "… no, you do not kill women and children. You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use your common sense."[285]

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284 Ibid

285 William L. Calley, "*Lieutenant Calley: His Own Story*", (1971) Viking, New York, 56.

Although, in Captain Medina's account, the orders were not to kill civilians, the platoon commanders he commanded and was issuing orders to, were under a different impression. The general impression was that the mission was to kill and destroy everything in the village. The acts involved killing the pigs, polluting the water supply, cutting down banana trees, burning the crops, burning the houses, and basically destroying the existence of the villages. The implied orders were to kill everyone in the village, including, men, women, and children.

Captain Medina's orders were interpreted by many present in the briefing in this way. For example: Sergeant Hodges said that he left the meeting with the impression that the order was to kill everyone. Senior Sergeant L.A. Bacon said he was under the impression that they were to kill all the Viet Cong and Viet Cong sympathizers in the village. Sergeant Charles West said he believed that they were ordered on a search and destroy mission, where they were to kill everything. Senior Sergeant Martin Fagan believed that he was under the order to kill everyone. Sergeant Isaiah Cowan was under the impression that the orders were to kill everything.

For First Lieutenant Calley, he was under the same impression as the other members of the company regarding Captain Medina's orders. First Lieutenants Calley's believed the orders meant:

> "We were going to start at My Lai 4 and would have to neutralize My Lai 4 completely and not let anyone get behind us. Then we would move to My Lai 5, and so on until we got into the Pinkville area. Then we would completely neutralize My Lai 1, which is Pinkville. He said it was completely essential that at

> no time [should] we lose our momentum of attack, because the two other companies that had assaulted the time in there before, had let the enemy get behind him, or had passed through the enemy, allowing him to get behind him and set up behind him, which would disorganize when he made his final assault on Pinkville. It would disorganize him, they would lose their momentum of attack, take heavy casualties, and would be more worried about their casualties than they would their mission, and that that was their downfall. So it was our job this time to go through, neutralize these villages by destroying everything in them, not letting anyone or anything get in behind us, and move on to Pinkville… adding Someone had asked if that meant women and children, and Captain Medina had said 'that meant everything.'" [286]

Under these circumstances, should the soldiers have followed Captain Medina's orders? In applying the test, undoubtedly, the orders issued to Charlie Company were from Captain Medina, an officer who was not only superior in rank but also had direct command of the soldiers. The orders and information regarding the operation at My Lai followed the prescribed channel of command, passing from the Battalion Commander, Lieutenant Colonel Baker, to Captain Medina, who in turn briefed his subordinates accordingly. The first test of the orders originating from a person who is superior and of authority is satisfied.

The next question we ask is whether or not the orders issued by Captain Medina were known to be illegal by the soldiers? From the information and intelligence provided at the

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[286] Tony Raimondo, "*The My Lai Massacre: A Case Study*", http://www.fsa.ulaval.ca/personnel/vernag/EH/F/cause/lectures/my-lai.htm. 8.

briefing, an accepted conclusion would be that on the face of it, the orders seemed to be proper and did not expound any repulsive dissent. The missions was a search and destroy operation, with the aim of cutting off the supply link, or life line, to the Viet Cong. Destroying the vegetation, crops and animals would deprive them of a steady supply of food and resources. As to the civilians, the intelligence report had stated that they would be away at the market. In these circumstances it seems that the orders issued by Captain Medina to the soldiers would be seen not to involve any illegal act.

On the last test, did the orders manifest themselves to be unlawful? In analysing the briefing given, concerns were raised as to the actual operation and what it involved, especially the killing of everything in the village. The engaging and killing of armed combatants was justifiable; however, the killing of Viet Cong sympathizers and everything else was of concern. The concern of one of the soldiers when he asked: "… are we supposed to kill women and children?"[287] Was replied to by Medina, "Kill everything that moves."[288] At this point soldiers should have vigorously questioned Captain Medina on the engaging of children and women in this conflict. Common sense should have dictated that the killing of the women and children or for the matter, any person who was not involved in the conflict was wrong.

For any ordinary soldier, a blanket order 'to kill everything that moves' should have raised some question; especially when innocent people were involved. It is an accepted practice that persons who are not active participants of a conflict are protected; rather than prosecuted and killed. It is like saying that all American citizens, including all men,

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287 Ibid at 8.

288 Ibid.

women, children, and elders were combatants because they had some relationship to the soldiers serving in the conflict in Vietnam. Men become targets because they are the father, brother or uncle of the soldiers, women become targets because they gave birth to the soldier and brought them up, children become target because they are related and continue to write letters of praise. Workers become targets because they produce goods that support the conflict and the soldiers. Arguably, in this manner, everyone has systematically become involved in the conflict and deemed to be a combatant.

However, there is an accepted understanding that not everyone in a conflict is an enemy that needs to be killed. There are a majority of innocent bystanders who are absorbed in the conflict without choice. In this case, the order by Captain Medina to kill “anything that moved”, manifests itself to be unlawful and should have been disobeyed. The answer to the question relating to the implied killing of the women and children should not have been readily accepted, but probed further to get a definite and clear answer from Captain Medina as to what he meant and confirmation that women and children were to be killed. As referenced earlier, it was generally accepted by the Company personnel that the orders involved the killing of women and children. The soldiers should have refused to follow such orders. This test has not been satisfied, in that the orders did manifest themselves to be unlawful and should not have been followed. There would be an unwillingness to extend the defence of obedience to a superior order under these circumstances.

4.1.2.2. First Lieutenant Calley's Orders: Massacre on the main trail leading to the village.

The second order to examine is that of First Lieutenant Calley, which he gave on the main trail leading into the village *My Lai* 4. Highlighted earlier was the incident where First Lieutenant Calley approached a group of soldiers who were guarding a group of civilians and as narrated:

> "1LT Calley approached the two soldiers guarding the group of civilians and told them to "take care of them." The two soldiers responded "OK.". When 1LT Calley returned, several minutes later, he said to the two soldiers: "I thought I told you to take care of them." One of them responded: "We are. We're watching over them." 1LT Calley retorted that that was not what he had meant, and that he wanted them killed. "We'll get on line and fire into them. Fire when I say fire.""[289] [sic]

Using the same test as earlier, to determine whether or not the orders by First Lieutenant Calley should have been followed, the first test of the orders originating from a person who is superior and of authority is satisfied. The order issued by First Lieutenant Calley was that of a superior officer in rank and in direct command of the soldiers. The orders were given to members of the platoon which First Lieutenant Calley commanded.

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[289] Ibid at 13.

The next question is whether or not the orders issued by First Lieutenant Calley were known to be illegal by the soldiers. Unlike the earlier incident, the orders issued by First Lieutenant Calley would have generated certain concerns, especially when the old men, women and children were seen not to be engaged in any form of military activities. At this point in time, it had become evident that there were no shots fired at the soldiers from the village and no Viet Cong had been sighted or found. The orders by First lieutenant Calley seem to have extended, and that the operation was no longer contained in the village but had extended to the outer boundaries, absorbing innocent civilians who had not earlier been associated in the military operation. The orders regarding civilian were contrary to the intelligence received that they would be away at the market. The presence of the civilians should have raised concerns and questions about their involvement and the orders to kill them. In regards to the orders issued by First Lieutenant Calley under these circumstances, the soldiers should have known that there seemed to be certain illegal acts involved. However, there is inconclusive evidence to suggest that the soldiers knew that the orders by First Lieutenant Calley were illegal.

One other important issue is that of a soldier refusing to fire his weapon, giving the excuse that he was armed with a grenade launcher and did not intend to waste ammunition. It is hard to gauge whether this refusal was based on a moral attack that what was about to happen was morally wrong or for some other reason. The position is made difficult because the soldier refusing to fire had earlier been seen threatening the life of a child if the mother did not perform oral sex. For this reason it is hard to gauge the feeling that existed amongst the troops, but it can be inferred that there is a possibility

that there may have been some inclination amongst the soldiers not to follow the orders to kill.

Finally, the last test, whether or not the orders manifest themselves to be unlawful. In analysing the orders given by First Lieutenant Calley, the soldiers should have been concerned with the fact that old men, women and children were ordered to be executed. These civilians had displayed no acts that would have immediately associated them with the Viet Cong; there were no military engagements made against the soldiers. At this point soldiers should have vigorously questioned First Lieutenant Calley on his orders to execute the men, women and children. Using common sense, the soldiers should have realised that it was improper and grossly illegal to kill civilians, or for that matter, any person who was not involved in the conflict.

The soldiers should have realised that the presence of civilians in the village and outskirts raises concerns about the intelligence and the mission. Common sense would tell them to question the orders involving the killing of civilians, knowing that they were not the real enemy. In this case, the order by First Lieutenant Calley to kill all the men, women and children on the trail should have been disobeyed. The question relating to the killing of the men, women and children should not have been accepted but questioned further, as to why they were being killed. This test has not been satisfied, in that the orders did manifest themselves to be unlawful and should not have been followed. There would be an unwillingness to extend the defence of obedience to a superior order under these circumstances.

4.1.2.3. Lieutenant Calley's Orders: Massacre at the irrigation ditch.

The third order is also that of First Lieutenant Calley, given at the irrigation ditch leading into the village *My Lai* 4. Again these incidents were highlighted earlier; however, what is important in this incident is the reaction of certain soldiers, especially to the killing of innocent men, women and children. As narrated by Raimondo, This is briefly what happened at the irrigation ditch:

> "Ten members of 1st PLT were guarding forty to fifty Vietnamese at an irrigation ditch. While 1LT Calley was questioning a Buddhist monk through an interpreter, a child approximately two years of age somehow managed to crawl out of the ditch unnoticed by the soldiers. 1LT Calley walked over, picked up the child, shoved the child back into the ditch, and then fired at the child, before returning to question the monk. Tired of questioning the monk, 1LT Calley pulled him round, hurled him into the paddy, and opened fire with an M-16. In the meantime soldiers continued to escort and force the Vietnamese villagers into the irrigation ditch. Some were pushed, while others were butted; some Vietnamese jumped in by themselves; and yet others remained sitting at the edge, wailing because it was clear to them that, once inside the ditch, disaster was imminent"[290]

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290 Ibid at 8.

What transpired after this is important, especially in determining the feeling that existed amongst the soldiers. There was evidence that although the soldiers agreed to the killing, there were some who were reluctant to carry out the orders. As Raimondo writes:

After 1LT Calley shoved a wounded woman into the ditch, he turned to one soldier and ordered: "Load your machine gun and shoot these people." When the soldier responded "I'm not going to do that," 1LT Calley pointed his M-16 on the soldier as if threatening to shoot him on the spot. The standstill came to an end when 1LT Calley backed off after some other soldiers intervened. 1LT Calley and other soldiers, one of whom was the same soldier that had earlier broken down and cried, after participating in the first large scale atrocity in the village, fired into the irrigation ditch. The Vietnamese tried frantically to hide under one another, mothers once again desperately attempted to protect their young children (and babies) by covering or shielding them with their bodies. The remnants of shredded human flesh and pieces of broken bone flew through the air, as magazine after magazine was emptied into the shallow ravine.[291]

The analyses of the incident shall be based on the same tests applied earlier. As to the determination of whether or not the orders by First Lieutenant Calley should be followed or not, the orders issued were that of a superior officer in rank and in direct command of the soldiers. The orders were given to members of the platoon which First Lieutenant Calley commanded. The first test of the orders originating from a person who is superior and of authority is satisfied.

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[291] Ibid.

Were the orders issued by First Lieutenant Calley known to be illegal by the soldiers? From the narration, it is fairly evident that the soldiers knew very well that the orders from First Lieutenant Calley were illegal. As the order was given, there was refusal to comply. The orders were clearly directed at acts that went beyond what the soldiers were required to do at *My Lai* 4. The orders were directed at acts against civilians, who were clearly not associated with the mission. The mere fact that soldiers had voiced dissent in carrying out the orders of First Lieutenant Calley is a clear indication that they knew the orders to be illegal. In this case it can be said that the soldiers knew that the orders were illegal and should not have complied.

On the last test, as to whether or not the orders manifest themselves to be unlawful, this incident had clearly manifested itself to be unlawful. The orders requiring the killing of innocent men, women and children brought about a clear revulsion amongst the soldiers when they initially refused to comply with the orders. It was evident that the civilians at the ditch were not associated with the mission, there was no evidence of them having links with the Viet Cong and no civilians had conducted themselves in any way that would suggest that they were aligned with the enemy. In this instance, there were enough indications to clearly suggest that the orders by First Lieutenant Calley had manifested themselves to be illegal.

Of major concern in this case is that despite the soldiers knowing that the orders were illegal, they continued to participate in the atrocity. The standoff between First Lieutenant Calley and the soldier who refused to fire his weapon was defused by the intervention of

other soldiers. Here was an incident where a threat was made to shoot a soldier if he did not comply with orders. Unfortunately, the soldiers succumbed to the carrying out of the illegal act in an attempt to diffuse a situation which would see one fellow officer shooting another comrade or vice versa. This incident is quite relevant because it reflects the reality that would be encountered in armed conflict situations. It is situations like this which test the limits of officers and soldiers; for the officer, how far he can push his soldiers in complying and executing orders; for soldiers, how far they can go in avoiding complying with an illegal order.

Unfortunately, in this case, the soldiers in attempting to diffuse the situation and avoid First Lieutenant Calley firing upon the soldier, agreed to carry out the atrocities. Would the situation have been different if the other soldiers had also supported the soldier and voiced their dissent in carrying out the orders? Would First Lieutenant Calley have stopped himself from committing other illegal acts? The possibility of the atrocity stopping if the other soldiers voiced their dissent was likely; the massacre at the ditch may have been avoided. The lesson to take out of this is that the likelihood of soldiers being absolved in this situation is slim. For saving one life, numerous others were sacrificed. Even under these circumstances, a defence of obedience to superior orders is unlikely to win.

The three incidents have looked at the positions relating to the obedience of superior orders, and according to the relevant tests, whether or not the soldiers should have complied with the orders. From one particular mission, a series of orders that portrayed

varying positions relating to compliance with such orders have been recounted. This case highlights confusion and indecision relating to the mission concerned mainly with civilians and their treatment. How could the situation have been improved in order to minimise or eliminate the possibilities of atrocities being committed? The areas where improvements could have been made in an effort to minimise or eliminate atrocities as experienced above will now be discussed.

4.1.3. Analysis of the *My Lai* Massacre: Improving Orders.

The massacre at *My Lai* has evidenced atrocities which are hard to comprehend, especially when disguised as acts commissioned in obedience to superior orders. This chapter has addressed three different circumstances where orders were given to kill innocent men, women and children. Earlier examples were also given of orders which manifested themselves to be illegal and should not have been adhered to. How could the acts have been avoided, especially concerning the orders issued by the commanders? The following propositions are some ways in which military commanders could improve on the issuance of orders, allowing soldiers to better evaluate and assess the directives and decide whether or not the orders are to be followed.

4.1.3.1. Orders must be clear and precise.

The *My Lai* massacre serves as a classic example of how a mission can go horribly wrong when it lacks clear and precise directions of what the soldiers ought and ought not to do. This was a mission undertaken on verbal orders. Very little was documented on the

military operation and its conduct. A general classification was made of the mission, being a 'search and destroy' operation. Orders were full of ambiguity: who were the enemies in this situation, what the enemy situation was like on the ground, its composition and ability at the time. There were no clear orders given regarding the care and safety of civilians, despite knowledge that the mission involved a residential farming village which mainly housed civilians.

The orders by commanders were so ambiguous that soldiers walked away from the briefing under the impression that the search and destroy mission meant the killing of everything in the village, including civilians. Statements were made by commanders saying, “kill anything that moves”. What was not mentioned clearly was whether this orders included men, women and children. If this issue had been clearly identified, and clear instructions given by Lieutenant Colonel Baker as to what could and could not be done, a lot of, or all of the atrocities could have been avoided. The preceding killings by Captain Medina and First Lieutenant Calley would have been avoided because a clear instruction would have existed of what they were allowed and not allowed to do. A clear directive that no civilian was to be killed or injured, mishandled, or raped could have avoided all of the atrocities.

It is fairly clear that the *My Lai* operation lacked organisation and composure. Here was a military operation conducted without any sense of direction. It was chaotic in its approach. There were high explosive rounds landing near the village, heavy machine guns firing rounds indiscriminately into the village as the ground force moved in. It was

evident from the start that there was no consideration made for innocent people who could be caught in the operation. There is no evidence of any spotters or forward observers being positioned to evaluate the situation on the ground as the mission evolved. This was a mission which required detailed planning and needed to be broken down into phases. This would have allowed commanders to assess and evaluate the situations after each phase of the operation. This operation should have been divided into segments; phase one to involve the move and secure of the outer perimeter of *My Lai* villages. Phase two to involve the advance and search of the village and the securing of all civilians located in it. Phase three to involve destruction of the village, including houses, crops and animals. Phase four to involve the displacing of the villagers, and finally phase five to involve the withdrawal of the Forces from *My Lai*.

The failure to have clear and precise orders from commanders was equally responsible for the atrocities committed at *My Lai*. If the orders were precise, not only in details but the reasons behind the mission, then the soldiers would have been in a better position to decide whether to follow the orders or not. This mission was undertaken with very few directives, leaving the soldiers to second guess what to do, causing confusion and mayhem. This case serves as a good illustration that the failure to issue clear and precise orders leaves room for wrong interpretation and confusion. Confusion and indecision in a battle field results in loss of lives, both to the detriment of the soldiers and innocent civilian.

4.1.3.2. Orders to have full intelligence.

As mentioned earlier, information is vital for any military operation, it not only provides details about the enemy, but at the same time allows preparations of battle plans. The biggest problem in the *My Lai* operation was the gathering of intelligence and acting on it despite the inaccuracy and the lack thereof. In Vietnam, there were varying sources where intelligence officers obtained information. The most common source was their own troops who reported on information gathered from patrols and military operations. There was information also obtained from surveillance from aircraft, helicopters and special troops sent out for surveillance and to gather information. Information was also supplied by the local informers and sympathisers, usually in return for a small fee. Lastly, the Americans had established a new intelligence agency within Vietnam, coded as the Phoenix Program.

The Phoenix Program was a Central Intelligence Agency cell, responsible for locating and destroying the Viet Cong political infrastructure. The Central Intelligence Agency provided funds, equipment and advisors for the program. The intelligence obtained for *Operation Muscatine* was provided by the Phoenix Program. Intelligence received was that the Villages around *Son Tinh* District had some 400 strong Viet Cong personnel belonging to the 48th Local Force Battalion present there. It was on this assessment that the military operation was planned and executed. However, surprisingly, most military intelligence officers operating on the ground disagreed with the information. Both the Army Division and the 11th Brigade were adamant that the 48th local Force Battalion

were nowhere near *Son Tinh*, especially *My Lai*. This information was also supported by the local informers and ground troops.

Also, the information provided to the troops was at the time of the operation was that there would be no civilians present in the village as they would have traveled to the market and elsewhere that morning. One cannot be sure what led to this conclusion. The soldiers were well aware that the villages housed around five to six hundred men, women and children. They were certain that at any one time, only few people ventured out to the market; most would be either in the village or the fields attending to their crops. It cannot be known whether this conclusion was a deliberate act to misrepresent the position of civilians in the village or whether it was genuinely believed that the village would be free of civilians. The latter was argued on the basis of leaflets that were dropped in the village earlier warning them of an imminent strike.

One other aspect of this operation was that the *Son Tinh* District was not a free fire zone. At the time, free fire zones were those areas identified by the South Vietnamese Government as approved areas where the military could employ their fire power because the area was free of civilians. At the time it was common for civilians to be relocated to refugee camps, commonly known as the Hamlet Program. This exercise usually involved the forceful removal of people who were allowed to carry what they could. In this operation, *Son Tinh* was already classed as a strategic hamlet program. The search and destroy mission at *My Lai* did not involve a resettlement, rather a straight out search and destroy. This position reinforces the discrepancy that existed regarding the intelligence on

the presence of civilians in the village. Although it was known not to be a free fire zone, and was known to be a hamlet and area composed of civilians, such was not accounted for in the intelligence issued to the military commanders.

The availability of accurate intelligence in this case would have allowed commanders and soldiers to plan and execute their orders with the objective of achieving their mission, without the fear of encountering obstacles or situations that may have given rise to criminal acts. If the commanders had been told that there was a possibility that the village would have men, women and children, plans could have been designed to see to their safe removal. These provisions would have eliminated any element of surprise because soldiers would have known beforehand what to expect. Importantly, orders would not have stated that all people present in the village were Viet Cong or their sympathisers.

Intelligence played a major role in the massacre at *My Lai*. If accurate intelligence was provided relating to the men, women and children present in the village, the manner in which the military operation was executed would have been different. Undoubtedly, concerns would have been raised about the safety of the civilians and their well being. At the very least, the soldiers would not have been misled by the numbers of the enemy and motivated to the extent that everything that moved was to be eliminated. Intelligence was very important in this mission, and is for any other military operation undertaken. The execution is very much dependant on information because, from such intelligence, the commander will give directions as to the fire power to be used, rules of engagement, and

instructions relating to general behavior and actions in the conduct of the military operation.

4.1.3.3. Questioning orders.

One of the upsetting aspects of this case is that in hindsight, all of the soldiers who were questioned in relation to the orders given for *Operation Muscatine* had reservations concerning the search and destroy mission and the presence of civilians. Although the soldiers were not clear on the part of their mission involving civilians, they walked away from the briefing with assumptions of what to do rather than seeking and obtaining clear directions with regards to men, women and children. This is a classic example where soldiers who do not ask question or seek clarification walk away and end up committing atrocities. Instead of doing what they are supposed to do, they do what they believe or assume they are supposed to do, more often doing the wrong thing. In this situation such was the case; the orders by Captain Medina were assumed to involve the elimination of everything that moved, interpreted to include men, women and children.

In the second incident near the ditch, a soldier questioned the orders of First Lieutenant Calley, only to receive a threat that if he did not comply he would be shot. Unfortunately, the soldiers who intervened in the impasse took the easy way out by complying with the orders by executing the men, women and children. Here was one soldier, who for once stood up to do the right thing; however, in this case the needed support of other soldiers was not there. If the soldiers had all stood together and vigorously questioned the orders, the end result would have been different.

Soldiers, when asking questions to seek clarification should be allowed to ask for written confirmation of the order, especially if on the face of the orders, gross violations of humanitarian law and atrocities are present. In most situations, further clarification and written confirmation would make the commander reassess his orders and make appropriate changes. For example, if an order was given to take care of the prisoners of war, clarification should be sought as to what 'take care of the prisoners of war' meant. If a reply was received saying, 'take them out in the jungle and shoot them', then, written confirmation of the order should be asked for. When the order is received in writing, the soldiers will then have the opportunity to decide whether to follow the orders, or refuse on the basis they are illegal orders.

The need to ask question and seek clarification regarding orders has been shown quite well in *My Lai*. Atrocities would not have been committed if only the commanders had asked the soldiers whether they understood what they were required to do, and in turn soldiers had sought further clarification and confirmation on certain issues of concern. This practice of seeking clarification and asking question is extremely important, allowing soldiers to eliminate any doubts or concerns they may have regarding orders. In the thick of battle, orders and their understanding should not be a matter of chance, rather like the professional institute they represent, soldiers must have a clear understanding of what they can and must not do. It is only through this process that both commanders and soldiers will be able to better their position regarding obedience to orders and determine

whether or not such orders are illegal or not and whether the same should be adhered to or not.

4.1.3.4. Adopting specific rules of engagement.

An interesting feature in the orders that were issued by Lieutenant Colonel Baker, Captain Medina and First Lieutenant Calley was the absence of any clear rules of engagement. Rather, looking at the facts, from the time the mission commenced, the soldiers were trigger happy, utilizing ammunition unnecessarily and shooting without control. The use of heavy artillery to soften the position, although not positioned on the village directly, failed to take into account individuals who might have been outside the perimeters of the village. There was no forward observer placed to control the artillery fire, to make sure that the battery commander had managed to get his coordinates for the preparatory fire right. The use of artillery prior to an assault on enemy positions is a common practice. However, arrangements need to be made to ensure that the designated targets are free of civilians or non combatants. The artillery fire orders were so relaxed that they gave an impression that it was a free fire zone with the expectation to use and fire rounds at will.

On the approach to the village, rounds were fired from helicopters in the open fields and landing zones. Machine guns blazed on as the troops were brought to the landing place. The advancing troops had not received any fire from the ground, despite this, soldiers continued to fire indiscriminately, with no specific target or enemy in sight. There were

incidents where even as the helicopters flew by and farmers were putting their hands up in a surrender fashion, they were shot at. These events were narrated by Raimondo:

> "... The "Dolphins" took off again and the leadership announced over the air that the landing field was "cold" -- i.e., that there had been absolutely no enemy fire. Nevertheless, the "Sharks" continued pouring all kinds of fire on the outskirts of the hamlet with machine guns, grenade launchers, and rockets.... There was intense aerial activity for the next twenty minutes, as the aircrafts continued searching for signs of enemy positions. None were found. A farmer standing in one of the many paddy fields surrounding the hamlet, frantically raised his hands so as to show that he had no weapons. Nevertheless, he was immediately struck by a burst of machine gun fire. This may very well have been the first casualty and unlawful killing of the day."[292]

This incident is a classic example of a care free rule of engagement, with no restraints of when and how weapons were to be discharged. This incident undoubtedly gave the soldiers the impression that they were at liberty to fire at whatever they wanted whenever they wanted, and that is what they did.

In the village, soldiers fired rounds at men, women and children, some were bayoneted and bellies slit open, and grenade rounds were lodged in hootches. All these acts indicated the lack of a clear directive and rules of engagement. Here were unarmed men, women and children slaughtered with the use of highly modernised weapons without limitations and constraints. In the issuance of orders, if the commanders had specifically

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[292] Ibid at 8.

addressed the rules of engagement, the atrocities would have been avoided. The adoption of any rules of engagement is heavily dependent on the intelligence collated about a mission. If the information is available, commanders can then formulate rules of engagement concerning different situations as they present.

To illustrate how effective rules of engagement can be, Appendix 9 shows an outline of rules of engagement that a military commander can adopt. These rules are not exhaustive, and can be added to and changed as the situation demands. What is necessary is that there is a set of rules present that will dictate the conduct of soldiers. These Rules are binding on soldiers; they are not mere guidelines. Failure to adhere to the standards is to the soldier's own detriment. It must also be noted that the rules are not to be too comprehensive and complicated, they must be said in a few words and pages. There is no need to make soldiers labour over tens of pages of rules, only to make them confused and disinterested.

4.1.3.5. Training soldiers on law of war.

In the Vietnam War, there were many occasions where American soldiers were brutally tortured when captured, with blatant disregard for the laws of war. As a result, many soldiers who had experienced or witnessed such brutality often themselves inflicted similar or harsher punishment to the enemy. In such cases, soldiers often disregarded rules of engagement or codes of conducts that may have existed or which they were ordered to obey. In the *My La*i incident, the resentment against the Viet Cong was

aggravated by the death of a prominent and much loved non commissioned officer, Sergeant George Cox, and some twenty eight other members of their unit in the last few months. As the *My Lai* operation unfolded, there was a feeling amongst the soldiers that it was 'pay back' time.

The absence of clear and precise orders, rules of engagement and directives allowed soldiers to capitalise by systematically disregarding the laws of war under the pretext that they were on a search and destroy mission, ordered to kill anything that moved. For some military commanders, it was a deliberate ploy to allow the soldiers to go beyond the orders, mostly aimed at restoring self confidence and moral. Then again, if not contained, the results could escalate to a proportion where innocent civilians are seen as plausible targets. For these reasons, it is necessary that commanders include in their orders the laws relating to war and ensure that subordinate commanders educate and train soldiers to identify and adhere to the law of war.

The teaching of the laws of war is important because, through the necessary provisions contained therein, there are checks and balances placed, allowing soldiers to differentiate between legal and illegal orders. The law of war at the least provides a platform where soldiers can stand and argue that a particular order by a superior is wrong and contrary to the principles advocated. The laws of war are like a torch that acts as a beacon for the soldiers, guiding them as they engage in battle. In the *My Lai* massacre, the torch was there for the soldiers to use. The commanders were responsible for lifting up the torch to pave the way for the other soldiers to follow. Unfortunately, not only did the commanders

fail to lift the torch up, worse still, they extinguished it themselves, well before those following could rely on it.

4.2. Conclusion.

The massacre at *My Lai* is not an event that one wants to witness and be constantly reminded of. Its shame lingers, and will live for generations to come. For military commanders and analysts, there is no better example to use when addressing concerns and matters relating to obedience to superior orders. This case not only affords us the opportunity to look at different circumstances in which orders were made and adhered to, but more importantly, it allows scrutinisation of the orders to decide whether or not, in the circumstances, they should have been complied with.

It is pitiful that we cannot reflect positively on the end result of this case. However, lessons should be learnt from this case and future military generations enlightened. Prior to this analysis, the development of laws relating to obedience to superior orders, and their application in various incidents in chapter four were explored. The three major tests adopted in determining whether a defence of obedience to superior orders is available or not were identified. The three tests were used and the conditions applied to this case; these conditions being: the person must be ordered by a superior or person of authority, the person did not know the order was unlawful, and the order did not manifest themselves to be unlawful. Conclusions as to whether the orders should have been

followed or not were made and certain areas where commanders could have done more to assist soldiers in their decision relating to the orders were addressed.

As evident, the application of the test is more stringent in terms of defence available and tends to place a heavy burden on soldiers in fulfilling the requirements of the test. These provisions in time will not become easier, but rather, will become more onerous for soldiers, if seeking to invoke a defence of superior orders. The responsibility now extends to military commanders to assist soldiers. This can be achieved by avoiding issuing orders that are unlawful and in breach of international standards of practice. This can be achieved by giving orders that are clear and precise, providing better intelligence relating to objectives and missions, allowing questions and questioning soldiers relating to orders, having specific rules of engagement and training soldiers on the laws of war. With this extra assistance, there will be more choices available to soldiers in deciding whether or not an order is illegal and whether it should be adhered to. This may prevent another massacre like *My Lai* in the future.

CHAPTER 5

CONCLUSION

Francisco De Y Lucientes Goya, “The Disasters of War”, 1746-1828, in http://www.artgalleryone.com/Goya/Goya%20works/32.jpg, 1

“It's a difficult path, which only a minority of subjects are able to pursue to its conclusion.... The act of disobedience requires a mobilization of inner resources, and their transformation beyond inner preoccupation, beyond merely polite verbal exchange, into a domain of action.... The price of disobedience is a gnawing sense that one has been faithless. Even though he has chosen the morally correct action, the subject remains troubled by the disruption of the social order he brought about, and cannot fully dispel the feeling that he deserted a cause which he had pledged support. It is he, and not the obedient subject, who experiences the burden of his action.”[293]

293 Stanley Milgram, “*Obedience to Authority*”, (1974) Harper & Row Publishers Inc., New York, 125.

One of the most common features of any armed forces is its ability to be different from the general public. Servicepersons are a group that draws itself apart from the community, trains in a different way, adopts a different camaraderie, functions by a particular set of laws and is known by a distinct identity. The life of a soldier is completely different and is best observed by Sir John Hackett when he says: "... he will be (or should be) always a citizen. So long as he serves he will never be a civilian."[294] As a result of its uniqueness, obedience and loyalty become the motto for soldiers. A new culture is developed, distinguished by the emphasis on command and control structure, customs and traditions, distinctive dress and badges, and by the general character of professionalism. At the end, the patriotic sentiments of the soldier are bolstered, to obey their commanders and to willingly sacrifice their lives in battle. A weak and gutless person is suddenly transformed into a mean fighting machine.[295]

This thesis sets out to look at the defence of obedience to superior orders and identify the existing laws, standards and applications that regulate a soldier's conduct especially when concerned with illegal orders. Although the military is regulated by a stringent set of laws, arguably, they are sometimes a non - effective instrument, serving limited purposes. In most instances, military law advances the scheme of the politicians and military commanders. Usually, a very fine distinction exists when orders are given, more so when trying to distinguish between legitimate acts, lawful use of force and illegal acts. These

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294 John Winthrop Hackett, "*The Profession of Arms*", *(1963)* Sidgwick & Jackson Publication Ltd., London, 222.

295 Fyodor Dostoyevsky, "*The House of the Dead*", (1959) Dell Publishing Company, New York, 1

distinctions were addressed to determine which of the orders a soldier needs to adhere to and which should be refused, simply because they are unlawful.

Throughout recorded history, we seem to have been plagued with more wars than peace. Everyday more atrocities and gross crimes against humanity are committed. It is a sobering thought that during 3500 years of recorded history, this world we live in has only seen about 268 years of peace.[296] Humanity is a feeling or understanding that seems to be fading everyday and drawing further and further away. Acts of atrocity committed by civilians are unacceptable, and deterrent action should be taken to stop them. However, when similar or worse atrocities are committed by soldiers, it is unimaginable and despicable, to the extent of being unforgivable. Understandably, concerns regarding law and war, and the urgent need to bring the conduct of war within accepted rules, have been vigorously pursued.[297] Law and war have evolved as armed conflicts have progressed, in art and technology, to an extent where new laws have been formulated after each major battle.[298]

The development of laws of war has brought about some degree of control and appreciation of how battle is conducted and what protections are to be afforded to prisoners of war, the injured, sick, non combatants and sea farers. The laws have not been limited to individual persons but similarly extend to the protection of property and

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296 Kagan, Donald, "On the Origins of War and the Preservation of Peace", (1995) Random House Inc., New York.

297 Quincy Wright, "*A Study of War*", (1965) Chicago University Press, Chicago, 1079

298 Michael Walzer, "*Just and Unjust Wars: A Moral Argument with Historical Illustrations*", (1977) Basic Books, New York, 46.

infrastructure, which if destroyed may result in catastrophic disaster. Coupled with these developments, has been the need to establish a court structure that would assist in adjudication.[299] The development of international humanitarian law, the recognition to the Geneva Conventions of 1949,[300] the Two Additional Protocols to the Geneva Conventions of 1977,[301] have culminated in the formation of the International Criminal Court with international jurisdiction.[302] The elevation of the world standard in accountability and prosecution has seen the emergence of new standards and developments, not only in regulation but also in the enforcement of laws of war amongst nations. These developments are significant because they no longer only regulate military conduct but more importantly, they hold all players to an armed conflict accountable for their actions or inaction, whether ordinary soldier, military commander, politician or head of state, and even civilians.

Chapter 2 of this thesis highlights certain areas where soldiers and military commanders could improve on the issuance of orders and help to minimise or avoid acts of atrocities altogether. The orders should be clear and precise and should not contain any ambiguity. Also, the need for accurate and full intelligence is important in planning and executing missions. All information should be provided rather than selectively excluding details which might have led to the orders being questioned, especially regarding their legality.

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299 Winfield Scott, "*Memoirs of Lieutenant General Scott*", (1864) Sheldon & Co, New York, 395.

300 Jean Pictet, "*Development and Principles of International Humanitarian Law*", (1985) Martinus Nijhoff Publishers, The Hague, 18 - 78.

301 Michael Bothe, Karl Josef Partsch & Waldemar Solf, "*New Rules for Victims of Armed Conflicts*", (1982) Martinus Nijhoff Publishers, The Hague, 604.

302 International Criminal Court, "*Rome Statute of the International Criminal Court*", (2003), New York in http://www.icc-cpi.int/index/php, 1.

The need for military commanders to allow soldiers to ask questions is important. It not only eliminates doubt but allows soldiers to have a better perspective of the orders and their mission. Questioning orders may at times result in mission plans being changed and avoid the chance of any criminal acts. A too readily accepted order allows military commanders to have free reign and at times this results in acts which go beyond the mission.

One of the important instruments that can have an enduring effect on military operations is the availability of a comprehensive list of rules of engagement. The rules of engagement not only regulate the force to be used in a situation, they act as a reference for soldiers, especially when asked to deploy or execute a mission beyond the accepted rules. Like any other aspect of military professionalism, the need to train soldiers on the doctrines of warfare and the laws of war is important. No longer can international humanitarian law be kept in isolation as it now forms part of the tools needed for successful soldiering. The need to train soldiers on the laws regarding armed conflict and that of obedience to superior orders is important. Soldiers must adapt to the changing environment of the laws and how they are affected by them.

Chapter 3 shows that obedience to superior orders has been recognised as a legitimate legal defence, both in international and national laws. However, the acceptance of this defence is not absolute and does not provide a blanket immunity.[303] The courts and tribunals have applied this defence very sparingly, allowing the defence to extend to

[303] Gary D Solis, "Critical Essay: Obedience to Orders and the Law of War: Judicial Application in American Forum", (2000) 15 *American University International Law Review*, 481.

those individuals who were deemed to be innocent when following the orders of a superior officer. The defence afforded is so sacred in its application that very rarely has a person successfully argued and succeeded in a defence of superior orders. This does not mean that the defence does not exist, or the courts will not recognise its availability.

The different positions of the courts and tribunals with respect to the defence of superior orders were contrasted. The Military Tribunals of the Second World War considered the defence of superior orders as a mitigation of punishment.[304] Similiar positions have been adopted by the International Criminal Tribunal for the Former Yugoslavia[305] and Rwanda,[306] allowing the defence only as mitigation for punishment.

The International Criminal Court has taken a more liberal approach and is susceptible to accepting a full defence.[307] The defence has three conditions; that the person must be ordered by a superior or person of authority, the person did not know the order was unlawful and that the order did not manifest itself to be unlawful. It is recognised that the person seeking relief must be able to establish that the orders originated from a person in authority and to whom he or she was under direct command. Of the conditions, the most demanding requirement to satisfy is that the orders did not manifest themselves to be unlawful.

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304 International Military Tribunal, "*Trial of the Major War Criminals Before the International Military Tribunal*", (1947), vol I, 10, 12 in http://www.yale.edu/lawweb/avalon/imt/imt.htm, 1.

305 United Nations, "*Statute of the International Criminal Tribunal of the Former Yugoslavia*", http://www:un.org/icty/statute.html, 1 – 4.

306 United Nations, "*Statute of the International Criminal Tribunal for Rwanda*", http://www:un.org/ictr/statute.html, 5.

307 International Criminal Court, "*Rome Statute of the International Criminal Court*", (2003), New York in http://www.icc-cpi.int/index/php, 1.

The international standards have been adopted in many national and military laws. In many instances, the same qualifications attach to a successful defence of obedience to superior orders. Undoubtedly, the standards associated with obedience to superior orders have been lifted to a higher level, especially when determining whether or not an order is lawful. The prevailing standards have become more onerous, for they not only place extra burdens on the soldiers receiving the orders in identifying their legality, but more importantly, the extension of this requirement when actually performing the military operation. Soldiers cannot simply restrict themselves to the understanding that when they received the orders, they were satisfied that the orders were consistent with the standards and conditions advocated regarding the obedience to superior orders. The soldier's performance and accountability now extends to the actual operation, requiring soldiers to evaluate their orders and what they are required to do in accordance with the existing law and standards.

Soldiers must understand that the defence of obedience to superior orders has limitations as to the forms of criminal acts it may apply to. The defence does not extend to criminal acts which give rise to crimes against humanity and genocide. Irrespective of the strength of a defence of obedience to superior orders, in relation to crimes against humanity and genocide, it is not considered a defence.[308] This limitation concerning crimes against humanity and genocide is important because of the broad meaning under international

[308] International Criminal Court, "*Rome Statute of the International Criminal Court*", (2003), New York in http://www.icc-cpi.int/index/php, 1.

law.[309] There is a danger of being caught under the legal provisions providing for crimes against humanity and genocide, rather than war crimes of murder or rape where a defence of obedience to superior orders would be available. It is imperative for these reasons that soldiers are well conversant with the orders and what they involve. There is no room for second guessing or leaving the results to chance, especially when there is concern regarding orders and the possibility that they may result in some form of atrocity.

Chapter 4 of this thesis uses the case study of the massacre at *My Lai* to illustrate how acts of atrocity can be committed when following superior orders. In our analysis, three specific orders by military commanders were identified and then used to test the standards provided under international law. The standards are used to determine whether or not the obedience to superior orders is qualified. As evidenced from this case study, it has been seen how soldiers could be misled due to poor orders, insufficient intelligence, and loose rules of engagement, into committing acts of terror far beyond imagination. The importance of having clear and precise orders and when in doubt to question orders, has been highlighted. This case serves as a classic example of where soldiers left the briefing under the apprehension that they were on a seek and destroy mission, including the killing of men, women and children, when in fact the orders and mission concerned something far less. Many aspects of obedience to superior orders were highlighted, with the view to gaining a better understanding, and eliminating doubts and confusion regarding superior orders, especially when it comes to identifying illegal orders. To avoid further atrocities like this, some suggestions on how military commanders could have improved on their orders were made.

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309 Ibid.

From observing the current situations around the world, armed conflicts will not be a rare occasion, with the likelihood of more and more as time progresses. Undoubtedly, there will be grave breaches of international humanitarian law by civilians and military alike. We can say with certainty that the defence of superior orders will be raised again and again. For now, it is unlikely that there will be any changes to the current position regarding the defence of superior orders especially concerning its standards and application. The current position adopted by national and international courts and tribunals and their case laws are going to continue for sometime to come with the possibility of the conditions being streamlined and made more stringent.

Military professionalism is unlikely to change in the future; the requirements for soldiers to go out in battle, and fight for their country and self will remain. Soldiers will be exposed to situations where they will be influenced by military culture, especially in the execution of orders that may constitute certain criminal liability. Despite the need for soldiers to be a mean fighting machine, they must have the opportunity to evaluate and determine for themselves whether or not an order is legal and should be adhered to. Long gone are the times when shooting first and reasoning later is acceptable. Subordinates are equally as liable as their superiors in their execution of military missions. Leaders owe it to their subordinates to ensure that they are not exposed to situations where they may be subjected to criminal charges.

We can no longer live in isolation when it comes to recognising and adapting to international humanitarian law. The need to educate and understand such laws must extend to everyone in society. It cannot be confined to military persons alone. Although this thesis has referred mainly to the defence forces, the applications highlighted are equally applicable to any person caught in a armed conflict situation. Armed conflicts will get more complicated and confusing, with some relief coming from knowing the laws concerning international humanitarian law. As one military commander wrote: "I know that if I ever go to war again, the first person I'm taking is my lawyer".[310] This best describes the concerns that exist today regarding warfare.

This thesis attempts to assist soldiers and military commanders in their understanding of the defence of superior orders, its standards and applications, especially for military persons; and how to minimise acts of atrocities, arising from obedience to superior orders. The hope is that innocent lives may be saved and the world made a better place to live in joy and harmony. As John Steinbeck writes about soldier and soldiering:

> "War did not make a killer of me, although for a time I killed men. Sending out patrols, knowing some of the men would die, aroused no joy in sacrifice in me as it did in some, and I could never joy in what I had done, nor excuse or condone it. The main thing was to know the limited objective for what it was, and, once it was achieved, to stop the process in its tracks. But that could only be if I knew what I was doing and did not fool myself--security and dignity, and then stop the

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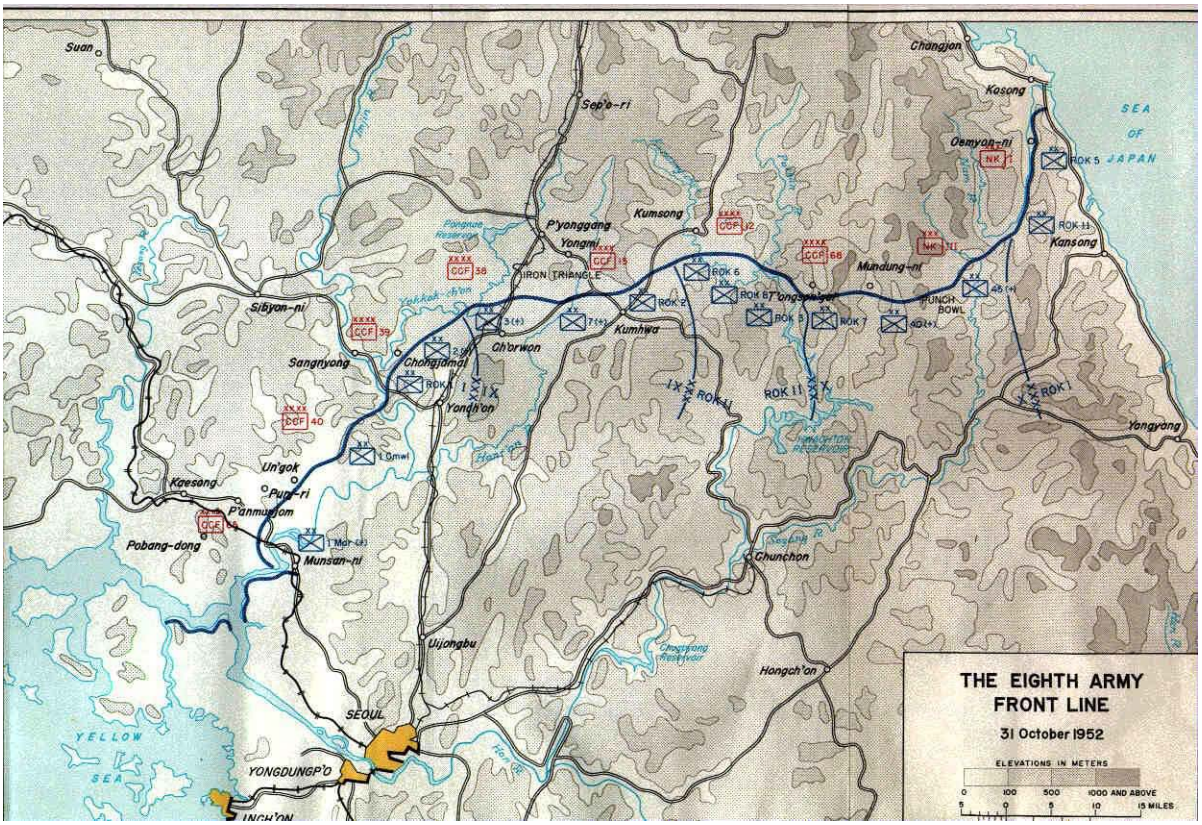
310 Finnegan Patrick, "Operation Law: Plan and Execution", (1996) *76 Military Law & Law of War Review*, 29.

process in its tracks. I know from combat that casualties are the victims of a process, not of anger nor of hate or cruelty."[311]

[311] John Steinbeck, "*The Winter of Our Discontent*", (1961) Viking Press, New York, 226.

APPENDIX 1

THE EIGHTH ARMY FRONT LINE: 31 OCTOBER 1952



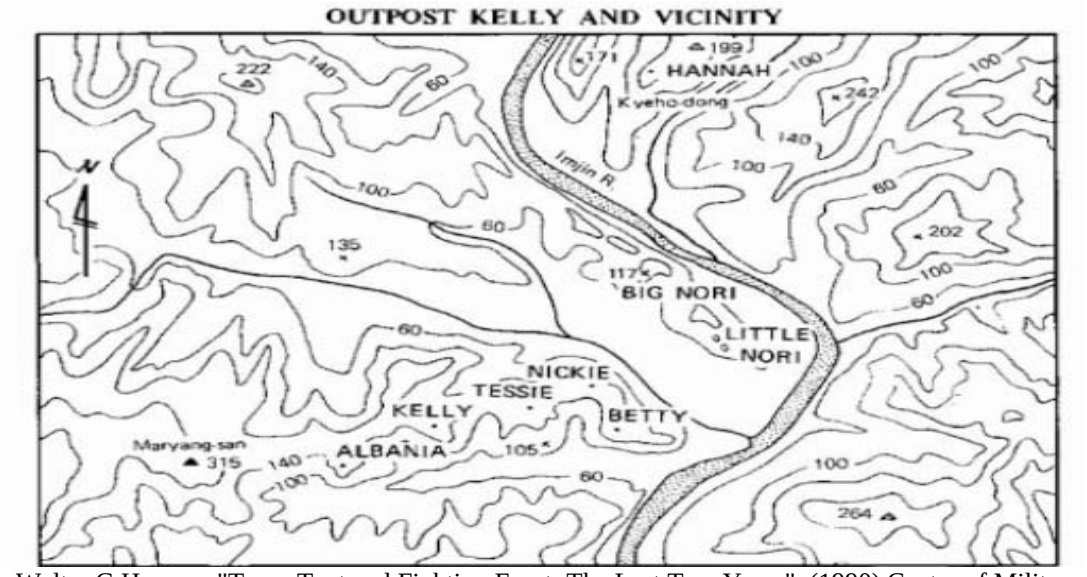
Walter G Hermes, "*Truce Tent and Fighting Front: The Last Two Years*", (1990) Centre of Military History, US Army, Washington, http://www.kmike.com/TruceTent/maps/311052.jpg

APPENDIX 2

OUTPOST KELLY: ARIEL VIEW

Walter G Hermes, "*Truce Tent and Fighting Front: The Last Two Years*", (1990) Centre of Military History, US Army, Washington, http://mervino.com/window/IBB/kelly.html.

THE 65th INFANTRY REGIMENT ON KELLY IN SEPTEMBER 1952



Walter G Hermes, "Truce Tent and Fighting Front: The Last Two Years", (1990) Centre of Military History, US Army, Washington, http://mervino.com/window/IBB/kelly.html.

APPENDIX 3

The Lieber Code of 1863

CORRESPONDENCE, ORDERS, REPORTS, AND RETURNS OF THE UNION AUTHORITIES
FROM JANUARY 1 TO DECEMBER 31, 1863.--#7
O.R.--SERIES III--VOLUME III [S# 124]

GENERAL ORDERS No. 100.

WAR DEPT., *ADJT. GENERAL'S OFFICE,*
Washington, April 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL.D., and revised by a board of officers, of which Maj. Gen. E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

By order of the Secretary of War:

E. D. TOWNSEND,

Assistant Adjutant-General.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

SECTION I.--*Martial law--Military jurisdiction--Military necessity--Retaliation.*

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation. The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity--virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist or are expected and must be prepared for. Its most

complete sway is allowed--even in the commander's own country--when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion. To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government legislative, executive, or administrative--whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced

government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the Army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts. Offenses to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished

under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country. In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight,

nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict

obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably--that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense

against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.--*Public and private property of the enemy--Protection of persons, and especially of women; of religion, the arts and sciences--Punishment of crimes against the inhabitants of hostile countries.*

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another. The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful-- on the contrary, it is held to be a serious breach of the law of war--to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete

conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character-such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whi1st besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and the churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war--such as judges, administrative or political officers, officers of city or communal governments--are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property (that is, of a thing), and of personality (that is, of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all

pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor. Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.

SECTION III.--*Deserters--Prisoners of war--Hostages--Booty on the battle-field.*

48. Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation. All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the Army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war and be detained as such. The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and

singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit. If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their Army, it would be a case for the severest retaliation, if not redressed upon complaint. The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities. All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the Army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer

death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign State, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited. Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the Army, under the direction of the commander, unless otherwise ordered by the Government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The Government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other

intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity. They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape. If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.

SECTION IV.--*Partisans--Armed enemies not belonging to the hostile army--Scouts--Armed prowlers-- War-rebels.*

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found

within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.

SECTION V.--*Safe-conduct--Spies-- War-traitors-- Captured messengers-Abuse of the flag of truce.*

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation. Exceptions to this rule, whether by safe-conduct or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according

to agreement approved by the Government or by the highest military authority. Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers accredited to the enemy may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy. The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war. Foreign residents in an invaded or occupied territory or foreign visitors in the same can claim no immunity from this law. They may communicate with foreign parts or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion

from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army or from a besieged place to another portion of the same army or its government, if armed, and in the uniform of his army, and if captured while doing so in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel,

authorized by the Government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.--*Exchange of prisoners--Flags of truce--Flags of protection.*

105. Exchanges of prisoners take place--number for number--rank for rank--wounded for wounded--with added condition for added condition--such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the Government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment. Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries. Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war. A cartel is voidable as soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing

his sacred character is deemed a spy. So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared. An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.--*The parole.*

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual, but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again. Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war unless exchanged. This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions,

fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

SECTION VIII.--*Armistice--Capitulation.*

135. An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared without conditions it extends no further than to require a total cessation of hostilities along the front of both belligerents. If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special--that is, referring to certain troops or certain localities only. An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between

giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any. If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force. But as there is a difference of opinion among martial jurists whether the besieged have a right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties the other party is released from all obligation to observe it.

146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement.

SECTION IX.--*Assassination.*

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

SECTION X.--*Insurrection-- Civil war--Rebellion.*

149. Insurrection is the rising of people in arms against their government, or portion of it, or against one or more of its laws, or against an officer or officers of the

government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce;

or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes--that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government. The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of

the war as much as the common misfortune of all war admits. The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government. Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

APPENDIX 4

EXTRACT FROM THE TRIAL OF Lieutenant William Calley

Lt. William Calley, Witness for the Defense

Direct examination by George Latimer:

Q: Now, I will ask you if during these periods of instruction and training, you were instructed by anybody in connection with the Geneva Conference?

A: Yes, sir, I was.

Q: And what was it -- do you have a recollection, what was the extent and nature of that tutoring?

A: I know there were classes. I can't remember any of the classes. Nothing stands out in my mind what was covered in the classes, sir.

Q: Did you learn anything in those classes of what actually the Geneva Convention covered as far as rules and regulations of warfare are concerned?

A: No, sir. Laws and rules of warfare, sir.

Q: Did you receive any training in any of those places which had to do with obedience to orders?

A: Yes, sir.

Q: What were the nature of the -- what were you informed was the principles involved in that field?

A: That all orders were to be assumed legal, that the soldier's job was to carry out any order given him to the best of his ability.

Q: Did you tell your doctor or inform him anything about what might occur if you disobeyed an order by a senior officer?

A: You could be court-martialed for refusing an order and refusing an order in the face of the enemy, you could be sent to death, sir.

Q: Well, let me ask you this: what I am talking and asking is whether or not you were given any instructions on the necessity for -- or whether you were required in any way, shape or form to make a determination of the legality or illegality of an order?

A: No, sir. I was never told that I had the choice, sir.

Q: If you had a doubt about the order, what were you supposed to do?

A: If I had -- questioned an order, I was supposed to carry the order out and then come back and make my complaint. later

Q: Now, during the course of your movement through the village, had you seen any Vietnamese dead, or dead bodies?

A: Yes, sir.

Q: And how would you classify it as to whether it was a few, many, how would you -- what descriptive phrase would you use for your own impression?

A: Many.

Q: Now, did you see some live Vietnamese while you were going through the village?

A: I saw two, sir.

Q: All right. Now, tell us, was there an incident concerning those two?

A: Yes, sir. I shot and killed both of them.

Q: Under what circumstances?

A: There was a large concrete house and I kind of stepped up on the porch and looked in the window. There was about six to eight individuals laying on the floor, apparently dead. And one man was going for the window. I shot him. There was another man standing in a fireplace. He looked like he had just come out of the fireplace, or out of the chimney. And I shot him, sir. He was in a bright green uniform....

Q: All right. Now that you gave that incident, did you see any other live individuals who were in the village itself as you made through the sweep?

A: Well, when I got to the eastern edge of the village, I saw a group of Vietnamese just standing right outside the eastern edge of the village, sir, the southeastern edge.

Q: All right. Was there anybody there with that group of individuals that you saw at that time?

A: I recollect that there were GI's there with them....

A: I heard a considerable volume of firing to my north, and I moved along the edge of the ditch and around a hootch and I broke into the clearing, and my men had a number of Vietnamese in the ditch and were firing upon them.

Q: When you say your men, can you identify any of the men?

A: I spoke to Dursi and I spoke to Meadlo, sir.

Q: Was there anybody else there that you can identify by name

A: No, sir. There was a few other troops, but it was insignificant to me at the time and I didn't--

Q: What was your best impression of how many were there at the ditch?

A: Four to five, sir.

Q: Two of whom you can specifically identify, Meadlo and Dursi?

A: Yes, sir. I spoke to those two.

Q: What did you do after you saw them shooting in the ditch? A: Well, I fired into the ditch also sir. . .

Q: Now, did you have a chance to look and observe what was in the ditch?

A: Yes, sir.

Q: And what did you see?

A: Dead people, sir.

Q: Let me ask you, at any time that you were alone and near the ditch, did you push or help push people into the ditch?

A: Yes and no, sir.

Q: Give us the yes part first.

A: Well, when I came out of this hedgerow, I came right up -- came right up about the last man to go into the ditch. I didn't physically touch him, but if he would have stopped, I guess I would have.

Q: Well, did he -- was somebody there with him to order him in or push him in?

A: They had been ordered in -- to go to the ditch, sir.

Q: Do you know who gave them that information?

A: Well, indirectly, I did, sir.

Q: And indirectly, what do you mean by that, was it through somebody?

A: I had told Meadlo to get them on the other side of the ditch, sir....

Q: All right. Then what did you do?

A: I butt-stroked him in the mouth, sir.

Q: With what effect?

A: It knocked him down.

Q: Did you shoot him?

A: No, sir, I did not....

Q: Let me ask you another -- your impressions of another incident. There has been some testimony in the record to the effect that there was a child running from the ditch, that you threw him back into the ditch and you shot him. Did you participate in any such event?

A: No, sir, I did not.

Q: Did you see a boy or a child running from the ditch?

A: Wait, let me backtrack. Now this child that I supposedly said I shot, now, was running away from the ditch, but it is not in the same location. It is east of the ditch, but he was running away from the ditch. Now, I don't--

Q: To the extent that you shot and it turned out ultimately to be a child, is that the only impression you have of any incident which involved a child?

A: Yes, sir, I do.

Q: There has been some information disclosed that you heard before the court that you stood there at the ditch for a considerable period of time; that you waited and had your troops organized, groups of Vietnamese thrown in the ditch and knocked them down in the ditch or pushed them in the ditch and that you fired there for approximately and hour and a half as those groups were marched up. Did you participate in any such shooting or any such event?

A: No, sir, I did not.

Q: Did you at any time direct anybody to push people in the ditch?

A: Like I said, I gave the order to take those people through the ditch and had also told Meadlo if he couldn't move them, to waste them, and I directly -- other than that, there was only that one incident. I never stood up there for any period of time. The main mission was to get my men on the other side of the ditch and get in that defensive position, and that is what I did, sir.

Q: Now, why did you give Meadlo a message or the order that if he couldn't get rid of the to waste them?

A: Because that was my order, sir. That as the order of the day, sir.

Q: Who gave you that order?

A: My commanding officer, sir.

Q: He was?

A: Captain Medina, sir.

Q: And stated in that posture, in substantially those words, how many times did you receive such an order from Captain Medina?

A: The night before in the company briefing, platoon leaders' briefing, the following morning before we lifted off and twice there in the village. . .

Q: Can you identify the east -- what has been testified to as the east-west, north-south trails on the map?

A: You mean from being there or being in this courtroom?

Q: Well, from being there?

A: No, sir. I never had any idea where an east-west trail was, sir.

Q: Did you ever pass the area, in your maneuvering that day, which would bring you into a situation where you would see what was on the north-south trail south of the perimeter of the village itself? Did you go south far enough, or did you see along the north-south trail any group of bodies?

A: No, sir, I didn't no. . I was never down in that area, sir. . .I never went down there; I never saw anything down there.

Q: Did you ever, in your walking through this area, see any large group of Vietnamese of various sexes and ages dead in large piles or large groups?

A: Where I shot two men, there was, I would say, a large group of people already dad in that building. It would have been five to six dead people there. Other than the ditch, no, sir. That was all, that was the only group of people I saw there, sir. Large I mean.

Q: All right. Did you see some isolated groups of what you would call a small, or numerically might be around five or six, along that area?

A: Five or six sounds pretty large to me. I would say there would be groups of two and three here and there, sir, up to five and six in groups. But the only one that stands out in my mind is the one inside the building. And just people, dead people spread all over the village. . .

Q: Tell the court, in your judgment, how many rounds of ammunition you expended?

A: I am not absolutely sure. I, during lunchtime, I know -- that is the only time I changed magazines. I don't thing I used -- I still had rounds left in the original magazine, but moving out, I went on and made sure I had a full magazine. Just sort of precautionary

Q: In your personal situation, what did you use as a full load for a magazine?

A: Eighteen, sir....

Q: I am going to ask you this: During this operation, May Lai Four, did you intend specifically to kill Vietnamese -- man, woman, or child?

A: No, sir, I did not.

Q: Did you ever form any intent, specifically or generally, in connection with that My Lai operation to waste any Vietnamese -- man, woman, or child?

A : No sir, I did not.

Q: Now, did you on that occasion intend to waste something?

A: To waste or destroy the enemy, sir.

Q: All right. Now, what was your intention in connection with the carrying out of that operation as far as any premeditation or intent was concerned?

A: To go into the area and destroy the enemy that were designated there, and this is it. I went into the area to destroy the enemy, sir.

Q: Did you form any impression as to whether or not there were children, women, or men, or what did you see in front of you as you were going on?

A: I never sat down to analyze it, men, women, and children. They were enemy and just people.

Q: Did you consciously discriminate at you were operating through there insofar as sex or age is concerned?

A: The only time I denoted sex was when I stopped Conti from molesting a girl. That was the only time sex ever entered the -- my whole scope of thinking.

Q: In this instance, we you saw a group being supervised or guarded by Meadlo, how did you visualize that group? Did you go in the specifics in any way?

A: No, sir. It was a group of people that were the enemy, sir.

Q: And were you motivated by other things besides the fact that those were the enemy? Did you have some other reason for treating them that way altogether? I am talking now about your briefings. Did you get any information out of that?

A: Well, I was ordered to go in there and destroy the enemy. That was my job on that day. That was the mission I was given. I did not sit down and think in terms of men, women, and children. They were all classified the same, and that was the classification that we dealt with, just as enemy soldiers.

Q: Who gave you that classification the last time you got it?

A: Captain Medina, sir. . .

Q: Now, I will ask you this, Lieutenant Calley: Whatever you did at My Lai on that occasion, I will ask you whether in your opinion you were acting rightly and according to your understanding of your directions and orders?

A: I felt then and I still do that I acted as I was directed, and I carried out the orders that I was given, and I do not feel wrong in doing so, sir....

Q: In connection with this operation, were you asked by Captain Medina to give a body count?

A: Yes, sir.

Q: Were all platoon commanders asked the same question, to your knowledge?

A: I know the second platoon was there with me, and he also gave a body count, sir.

Q: And did you hear the total results turned in to Captain Medina?

A: No, sir

Q: You don't know what the other two platoons turned in?

A: Yes, sir, I think I know how the platoon thing ran, sir.

Q: All right, tell us how it ran?

A: My platoon, I believe, took fifty; second platoon took fifty; third platoon took fifty; and we gave fifty to the artillery and fifty to the gunships and just about roughly about that much. I don't have the exact figures but it was around in that area, sir.

Q: Well, it was now -- when you say you took this and we took that, was that in the presence of Captain Medina?

A: Yes, sir.

Q: And did you sit down in his presence and figure out this body count and give it to him?

A: You just make an estimate off the top of your head. There is no way to really figure out exact body count. At that time, everything went into a body count -- VC, buffalo, pigs, cows. Something we did, you put it on your body count, sir.

Q: Is that the procedure adopted in your task force?

A: It was about -- I would say it was running that way, yes, sir. I wouldn't say it was an adopted procedure, but that is about how it was being run and estimate

Q: And in connection with that, at this luncheon, was there some discussion about the method to be employed or was that the method that was just employed by you and the other commanders?

A: I was -- never heard of a method that was trained in employing to come up with a body count. As long as it was high, that was all they wanted.

Q: There weren't any specifics, but this was desirable?

A: Right. I had been on it enough times where they told me, just come back with a body count.

Q: Were you ever criticized for a body count?

A: I was criticized for getting too many shot and not coming back with the enemy.

Q: Did your commanders seek to get a high estimate from you?

A: I generally knew if I lost a troop, I'd better come back with a body count of ten, say I shot at least ten of the enemy, which was pretty hard when you are only fighting one sniper.

Cross examination by Daniel:

Q: Did you receive any fire getting off the helicopter?

A: I have no way to know, sir. I was not hit, no, sir.

Q: Were you consciously aware of receiving any fire?

A: No, sir, I wasn't . . .

Q: Did you receive any fire during this period you were waiting?

A: No, sir....

Q: Did you see any Vietnamese?

A: Yes, sir

Q: Where was the first time you saw Vietnamese?

A: In the tapioca patch.

Q: Could you describe the Vietnamese you saw in the tapioca patch?

A: No sir.

Q: What was he doing?

A: He was dead, sir.

Q: Was it a man or a woman?

A: I don't know, sir.

Q: When is the next time you saw a Vietnamese?

A: About three feet beyond him, sir.

Q: What was he doing?

A: He was also dead, sir.

Q: When was the next time you saw one?

A: I would say they were all throughout the village. I don't -- I can't pick out every Vietnamese that I saw dead there. Just all the way through the village, there were dead Vietnamese.

Q: When is the first time you saw a live one?

A: On the eastern edge -- well, the two that I shot while going through there, sir.

Q: Those were the only live Vietnamese you saw going through?

A: That I can remember, yes, sir.

Q: Did you give out any instructions to your men to gather up the people that were there?

A: Yes, sir.

Q: Who did you give those instructions to?

A: Sergeant Mitchell, sir.

Q: To have them gathered up?

A: Yes, sir.

Q: For what purpose?

A: Clearing the mine field, sir. I told him to hang onto some of the Vietnamese inc case we encountered a mine field, sir....

Q: What were you firing at?

A: At the enemy, sir.

Q: At people?

A: At the enemy, sir.

Q: They weren't even human beings?

A: Yes, sir.

Q: Were they men?

A: I don't know sir. I would imagine they were, sir.

Q: Didn't you see?

A: Pardon, sir?

Q: Did you see them?

A: I wasn't discriminating.

Q: Did you see women?

A: I don't know, sir.

Q: What do you mean you weren't discriminating?

A: I didn't discriminate between individuals in the village, sir. They were all the enemy, they were all to be destroyed, sir....

Q: How did you know they were slowing you down?

A: Well, I generally know how South Vietnamese people move, and if you are going to move South Vietnamese people, you are not going to move them very fast, sir.

Q: Why did you tell Captain Medina they were slowing you down?

A: Because I knew they were slowing me down. It was another element that I had to move. . .

Q: Why were they being moved at all?

A: To clear a mine filed, sir, if necessary.

Q: What did Captain Medina say when you had the group of people, when you told him--

A: He told me basically to get rid of the people, to get moving

Q: He told you that basically?

A: To the best of my knowledge. I can't remember his exact words.

Q: You described the people to him?

A: No, sir. I didn't

Q: How did you describe them to him?

A: Vietnamese. VC

Q: Which?

A: Either one. I don't know, sir.

Q: You don't know how you described them?

A: In that area, I could have used either term.

Q: Do you know if there were women in that group?

A: No, sir.

Q: Do you know if there were children in that group?

A: No, sir.

Q: Do you know if there were men in that group?

A: No, sir.

Q: What did he say?

A: He told me to give -- to get rid of the people and get moving.

Q: What did you do?

A: I rogered . . .

Q: How did you interpret that?

A: As getting rid of them if I couldn't move them fast enough.

Q: Did you check with your men to see if they could move them fast enough?

A: Yes, sir.

Q: Was it fast enough?

A: So we could get into position in a relatively short period of time, sir.

Q: What did you do to effect this order?

A: At that time, I ran into Meadlo there and I asked him if he knew what he was supposed to be doing with those people.

Q: When you saw him where?

A: With a group of people, sir. I was on my way to a Sergeant Mitchell, sir. . . I saw Conti trying to molest a female, sexually molest a female.

Q: What was that?

A: Same time, sir, that I talked to Meadlo.

Q: Were they together?

A: No, sir.

Q: How did you do that? Describe the situation.

A: I went up to him and told him to stop what he was doing and get over where he was supposed to be at, sir.

Q: Were you talking to Meadlo at the same time?

A: No, sir.

Q: How far was Conti from Meadlo?

A: I don't know, sir.

Q: You saw them both at the same time?

A: I talked to Meadlo as I continued to move by him. I saw Conti molesting a female.

Q: Where?

A: On the other side of the group, sir.

Q: How long did you talk to Meadlo?

A: Only for a matter of seconds, sir.

Q: What did you say to him?

A: I asked him if he knew what to do with those people.

Q: What did he say?

A: He said he did, sir. I told him to get moving, sir.

Q: What did you mean when you said to him, "Get moving "?

A: Get the people moving, get them to the other side of the ditch.

Q: You didn't mean for him to kill them?

A: Not if he could move them, no, sir. I am still worried about the mine field, sir.

Q: Did he move them?

A: No sir.

Q: How far did you get before you ran into Conti?

A: Two steps.

Q: Did he have one of the people out of his group?

A: Right, sir.

Q: What did you say to Conti?

A: Told him to stop doing what he was doing and get to where he was supposed to be.

Q: What did he say?

A: He said, roger, and moved out.

Q: That is all he said?

A: Well, I don't know what he said. To the best of my knowledge, he could have said nothing.

Q: You weren't--

A: No, sir. Unless he said something to the negative, which he didn't as far as I was concerned

Q: Did he pull up his pants?

A: Yes, sir. I would imagine he would. He would look kind of funny if he hadn't

Q: Did you see him pull up his pants?

A: I didn't notice, no, sir. I wasn't paying attention to whether he had his pants up or down. I f he wanted to go around like that, that was his business.

Q: You weren't concerned with whether he was stopped or not?

A: Well, I stopped him, sir.

Q: D id he pull up his pants?

A: I don't know, sir. I didn't stand there to see if he pulled up his pants.

Q: How do you know if he stopped?

A: Because he released the girl's hair.

Q: And then what did you do?

A: She fell back.

Q: And you just left and walked away?

A: He started on his way.

Q: When is the last time you saw him?

A: That is the last time I recall seeing him that day, sir.

Q: Were you angry when he hadn't moved the group?

A: I don't think a violent anger, no, sir. It was distressing. It was slowing me down. But it wasn't actually Meadlo's fault. I mean, I didn't take it personally out on him.

Q: You didn't feel like he disobeyed your order in not moving the people at all?

A: He had basically disobeyed my order. But I didn't know what his problem was. I didn't take out a resentment on him. As far as I know, he didn't move the people.

Q: He disobeyed your order?

A: Yes, sir.

Q: This didn't upset you in combat, that a subordinate had disobeyed your order?

A: Not that order, no, sir. I felt that the man was trying to do the job the best way he could.

Q: So it depends on the type of order?

A: Yes, sir.

Q: What did you say to him, then, on that occasion?

A: If he couldn't move the people, to waste them, sir.

Q: What did he say?

A: He said, roger....

Q: What did you find when you got there?

A: My men were shooting men in the ditch, sir.

Q: What men?

A: Vietnamese men, sir.

Q: They were all men?

A: I don't know, sir.

Q: Did you look?

A: I looked into the ditch, yes, sir.

Q: What did you do when you got there?

A: I fired into the ditch, told my men to hurry up and get on the other side and get into position.

Q: Who of your men were there?

A: I spoke -- I recognized Meadlo being there and I recognized Dursi being there. There were other men there. I can't relate who they were, sir. . .

Q: Did you say anything to Dursi?

A: Yes, sir. . . told him to get on the other side of the ditch.

Q: Did you say anything to Meadlo?

A: Yes, sir. . . told him to hurry and get on the other side of the ditch.

Q: Did you shake him?

A: Yes, sir. . . Well, I didn't stand there and -- I just grabbed him by the arm and pointed him in the direction.

Q: Was he crying?

A: I don't know, sir. . .

Q: How long did you fire into the ditch?

A: I have no idea, sir.

Q: How many shots did you fire?

A: Six to eight, sir.

Q: One burst or semi-automatic?

A: Semi-automatic, sir. .

Q: Who did you fire at?

A: Into the ditch, sir.

Q: What at in the ditch?

A: At the people in the ditch, sir.

Q: How many people were in the ditch?

A: I don't know, sir.

Q: Over how large an area were they in the ditch?

A: I don't know, sir.

Q: Could you give us an estimate as to how many people were in the ditch?

A: No, sir.

Q: Would you say it was a large group?

A: No, sir. . .

Q: What were these people doing as they were being fired upon?

A: Nothing sir.

Q: Were they being hit?

A: I would imagine so, sir.

Q: Do you know?

A: I don't know if they were being hit when I saw them, no, sir.

Q: Do you know if you hit any of them?

A: No, sir, I don't.

Q: How far away were you from them when you fired?

A: The muzzle would have been five feet, sir.

Q: You didn't see the bullets impact?

A: Not that I recall, no, sir. . . My main thing was to go on, finish off these people as fast as possible and get my people out into position, sir.

Q: Why?

A: because that is what I was instructed to do, sir, and I had been delayed long enough. I was trying to get out there before I got criticized again, sir....

A: After he said No Viet" again, I butt stroked him in the mouth, sir.

Q: How hard did you butt-stroke him?

A: Quite hard, sir.

Q: What damage did it do?

A: It bloodied his face, sir.

Q: Did you hit him square in the mouth?

A: I hit his mouth, yes, sir.

Q: Did he go down on the ground?

A: Yes, sir.

Q: And then what did you do?

A: I had seen the helicopter by that time. I saw Sergeant Lagunoy come up toward me and I started moving toward Sergeant Lagunoy. . .

Q: Where was the man when you left him?

A: When I started walking away from him, he was on the ground. By the time I got two more steps he was in the ditch, sir.

Q: How did he get in the ditch?

A: Someone drop-kicked him into it.

Q: Was he still alive?

A: I don't know sir. I would imagine he was, sir.

Q; Did anybody shoot him?

A: I don't know, sir.

Q: You just left the man in the ditch?

A: Yes, sir.

Q: Did you search him for any weapons?

A: No sir.

Q: Had you directed that any of those people be searched?

A: No, sir.

Q: How close were those people to you in the ditch?

A: Three feet, sir.

Q: Were you scared they might be booby-trapped?

A: Yes, sir.

Q: Might have a grenade on them?

A: Yes, sir.

Q: Why didn't you direct that they be searched?

A: I feel much more secure in that situation not to search them, sir, or get that close to them. If a man made a move, you can defend yourself and get out of the way rather than bend down to try to search him if he pulls a grenade.

Q: Did you ever direct that anybody be searched?

A: No, sir, not that day. No, sir.

Q: Did you tell him the only way you could get them out was with a hand grenade?

A: No, sir, I did not. . . let me retract that statement. I hadn't thought about it until now. I believe I might have, yes, sir. I said about the only means I have to evacuate them out of there would be a hand grenade.

Q: How do you evacuate someone with a hand grenade?

A: I don't have any idea, sir.

Q: Why did you make the statement?

A: I t was a figure of speech, sir.

Q: What did you mean when you said it?

A: I meant -- just I meant only that the only means I could evacuate the people would be a hand grenade. And that isn't exactly evacuating somebody.

Q: What did you mean when you said it?

A: A figure of speech, sir, basically meaning that I didn't have any means to evacuate these people with, sir.

Q: That you would kill them if he didn't evacuate them?

A: No, sir, I didn't mean that, sir.

Q: What would you have done with them if he hadn't evacuated them?

A: I don't know, sir.

Q: Would you have taken them prisoner?

A: I don't know, sir.

Q: The cease-fire order had been given, had it not?

A: Yes, sir, to the best of my knowledge, it had. My troops had stopped firing, yes, sir. . .

Q: How many people were there?

A: I believe . . . I don't remember the exact number, basically about -- I don't really know sir. . . There were two gunship loads. I would say three or four on each gunship. Of course, they were Vietnamese, be much lighter, maybe they could have gotten six on the gunships, I don't know.

Q: Do you recall the sex of these people?

A: No, sir, I don't.

Q: Were there any children?

A: Yes, sir. Well, I am saying that they had to be definitely noncombatants, sir.

Q: You were discriminating at this point between sexes?

A: Yes, sir.

Q: Why were you discriminating then?

A: Well, I wasn't discriminating against sexes, let me put that up. But I had a means to discriminate, and we were no longer firing on -- I had been given a no-fire...

A: He asked me about how many -- basically what my body count -- how many people we had killed that day. And I told him I had no idea and for him to just go on and come up with an estimate, sir.

Q: Is that what you said to him?

A: Yes, sir. He had been to the area and seen the area, he could relate body count as well as I could, sir.

Q: Did he say what body count he would attribute to your platoon?

A: No, sir.

Q: How do you know he had been over the area?

A: I hadn't really know if he was over my area, sir.

Q: How did you know if he could arrive at a body count of your area?

A: Because he would have a better idea of what sort of body count he would want to put in than I would, sir.

Q: Just any body count? Just any body count, is that what you are saying?

A: Basically, yes, sir.

Q: Captain Medina could just put any body count that he wanted to put?

A: Any body count that was reasonable. I would imagine he would put the highest acceptable body count that he could.

Q: Did you have any other conversation with him?

A: No, sir. We continued on that discussion for quite some time.

Q: Could you relate the remainder of that discussion?

A: After he had given the body count and called it in, we were getting ready to split up and start moving agin, and higher called Captain Medina, called back and asked what percentage of that was civilians, that they had a report there was a high amount of civilians in the village, sir.

Q: What body count did he report?

A: I don't know, to be exact. I really don't.

Q: Did he give an actual body count?

A: Yes and no. I don't remember exactly what it was. I remember that I took fifty, sir.

Q: You did not hear him make a report?

A: Not exactly. I don't know what he finally came up with, though I believe it would be between two hundred fifty and three hundred, sir.

Q: When did you take fifty?

A: When we were discussing body count. It was broken down, fifty, fifty, fifty.

Q: When did this come up in discussion?

A: When we were sitting there discussing body counts, sir. . .

Q: Did you tell Captain Medina that you had shot the people in the ditch?

A: Yes, sir. I did.

Q: Did he ask any facts about that?

A: No, sir.

Q: How did you tell him about it?

A: He asked -- well, after the higher called back and asked -- said it had been reported that a lot of civilians were killed in the area, he wanted to know what the percentage of civilians was.

Q: What did you tell him?

A: I told him he would have to make that decision, sir.

Q: Is that what you told him? Those were your exact words to the captain?

A: Yes, sir.

Q: Did he ask you to describe the people you had shot?

A: No, sir.

Q: Did you give him any estimate?

A: No, sir.

Q: Did you tell him which of your men had been involved?

A: Involved in what, sir?

Q: Shooting into the ditch.

A: There wasn't any big deal, no sir.

Q: You told Captain Medina that you had rounded these people up, put them in the ditch and shot them?

A: No, sir. I didn't.

Q: What did you tell him?

A: I told him there was people shot over there in the ditch and people shot all through the village.

Q: Did you tell him the circumstances under which they had been shot?

A: No, sir. Why should I? He knew what -- the circumstances they were shot under, sir.

Q: How did he know?

A: Because he had told me to shoot them, sir....

A: I did give ham an estimate figure.

Q: What was that estimated figure you gave him?

A: Between thirty and forty, sir.

Q: Lieutenant Calley, did you just not testify within the last twenty minutes that you did not give any estimated figure?

A: No, I don't believe I did. You asked me if -- what Captain Medina said. I'd say he asked me for a body count. I told him to go on and make whatever he thought sufficient, that he'd been through the village.

Q: You didn't testify that you told Captain Medina that you -- he would have to use whatever he thought was appropriate based on the circumstances and he could come up with a figure he wanted?

A: Yes, sir. he surely could, sir.

Q: Was it your testimony now that you told him thirty to forty?

A: Sometime during the conversation, yes, sir. . .

Q: How did you come up with thirty or forty?

A: Off the top of my head, sir.

Q: Did he press you for a body count?

A: He said, just take something off the top of my head.

Q: So you said thirty or forty?

A: Right, sir.

Q: Did he ask for a weapons count?

A: Yes, sir.

Q: What did you tell him for that?

A: Zero that I had, sir.

Q: How did you know?

A: We didn't have any weapons, sir.

Q: You never questioned any of your men as to how many people they killed?

A: No, sir.

Q: And you didn't pick this thirty or forty based on the people you had scene?

A: No, sir, I didn't. . . That was a relative high body count of what I figured I had seen dead in that village, sir.

Q: And you gave him thirty or forty, and why did he then give you fifty?

A: That is the body count we wanted to submit, sir. I wasn't going to sit there and argue with him about body count. Mine was off the top fo my head. that is what he felt -- he thought.

Q: I want this clear. Is it your testimony that you gave him an estimate of thirty or forty, or is it your testimony that you said, "I don't have an estimate; you pick whatever you want"?

A:: I said both, sir....

Q: Let me ask you this: Did you have any Vietnamese save up for the mine field?

A: No, sir, I did not.

Q: Did you testify that you received any order before you left LZ-Dotti to save some of them for the mine field?

A: Yes, sir, I did.

Q: Why didn't you save some up for the mine field?

A: Captain Medina rescinded that order and told me to waste them, sir.

Q: When did he rescind that order?

A: When he called me on the radio, when he was in the eastern part of the village, sir.

Q: Did he specifically tell you to disregard the previous order?

A: No, sir. He said those people were slowing me down, waste them, sir.

Q: Save none fo the mine field?

A: No, sir.

Q: So you interpreted it to mean save none for the mine field, is that right?

A: The second time he told me, yes, sir.

Q: Were you concerned about utilizing people for the mine field?

A: Yes, sir, I was.

Q: Did you ask him that you thought it might not be advisable to save people for the mine field? A: not after he told me the second time.

Q; How many people would you use to take to the mine field?

A: Never any larger than the front I was covering, sir. If I had five men on the front, I wouldn't use more than five, sir. If I had twenty-man front, I would use no more than twenty, sir.

Q: One per man?

A: yes, sir.

Dr. Albert LaVerne; Witness for the Defense

Cross examination by Aubrey Daniels:

Q: Was Lieutenant Calley's judgment impaired beyond normal limits on March 16th, 1968?

A: What do you mean by "normal limits ?

Q: Was his judgment impaired on March sixteenth?

A: Yes, sir.

Q: How?

A: He could not challenge the legality or illegality of the orders given by Captain Medina. Captain Medina had become a father figure to him.

Q: Did he suffer from an irresistible impulse?

A: He was compelled to carry out that order without challenging that order. But I would not call it an irresistible impulse.

Q: Could he disobey that order?

A: No, he could not disobey that order. He was like an automaton, a robot. When the order came to stop shooting, the party's over, he stopped. But I would not classify it as an irresistible impulse because it went on for several hours later

Q: Was he conscious of his actions?

A: Yes, absolutely.

Q: Morally?

A: You meant did he know right from wrong? Yes he knew right from wrong.

Q: Was Lieutenant Calley psychotic?

A: No.

Q: Was Lieutenant Calley neurotic?

A: No.

Q: Did Lieutenant Calley know right from wrong?

A: Yes.

Q: Could Lieutenant Calley adhere to the right?

A: He had a compulsion to carry out his orders, to do his duty as an officer.

Q: Isn't that characteristic of a soldier?

A: Who else has done what Lieutenant Calley is alleged to have done? ....

A: He proceeded to carry out his orders.

Q: How?

A: One was to order Meadlo and another man to--

Q: What other man?

A: I'll have to check my notes.

Q: You do that.

Q: Are these your notes?

A: Part of them. They're base on my notes, on facts given me by Lieutenant Calley that I gave to Mr. Latimer.

Q: Did Lieutenant Calley tell you all of these facts about March sixteenth?

A: Well, I think I got more from the newspaper, radio, and television.

Q: You mean, you knew about what happened on March sixteenth before you talked to Lieutenant Calley?

A: I'd have to be pretty stupid not to know.

Q: Well, can you remember what he told you that wasn't in the newspapers and wasn't in the hypothetical statement?

A: No, all I can remember is what's in the hypothetical statement.

Q: Didn't you ask him a lot of questions?

A: Yes.

Q: What were some of those questions?

A: I don't remember.

Q: Why not? That's not so hard, is it? It doesn't take much energy to remember what you asked.

A: I spent by energy preparing for your cross-examination.

Q: Well, doctor, did you write down those questions so we can see them?

A: The questions weren't in written form.

Captain Ernest Medina, Witness of the Court

Questions asked by Judge Kennedy:

Q: Let me ask you, were there any questions asked of you at that briefing?

A: Yes, sir.

Q: Do you recall what they were?

A: Yes, sir. One of the questions that was asked of me at the briefing was, "Do we kill women and children?"

Q: What was your reply?

A: My reply to that question was: No, you do no kill women and children. You must use common sense. If they have a weapon and are trying to engage you, when you can shoot back, but you must use common sense."

Q: Were any provisions made by you for the treatment of any wounded Vietnamese?

A: No, sir.

Q: Was there any provision made for the capture and collection of the Vietnamese in that Village?

A: There were no instructions given as far as capture or collection of any noncombatants in the village of My Lai Four. It was standard procedure in operations that we had conducted that the sweep elements, when they moved through the village,

they would move through as rapidly as possible, pushing any of the inhabitants to the far side of the village, segregating them in an open area'....

Q: Did you say your purpose in being in the area was to look for weapons?

A: Yes, sir.

Q: And you thought this woman had a weapon?

A: Yes, sir.

Q: Now, why didn't you look for one?

A: Well, I was a little concerned about having shot the woman. She was the first person I had ever killed. I was a little scared, I didn't see any weapon and I was upset about having shot her....

Q: Did you cross any major trails that intersected that village, that run from north-south, east west?

A: Yes, sir.

Q: Did you see any bodies anywhere near this trail intersection?

A: Yes, sir....

Q: Now, had you received any radio communication from any part of your company concerning what the body count was up to that point?

A: Yes, sir.

Q: Did you relay that to Task Force Barker?

A: Yes, sir.

Q: Now, could you tell us who gave you these reports, or what the reports were?

A: The initial report that I had received was the first VC that the gunships had killed, the VC evading with weapons. The second report that I received was from the platoon leader of the first platoon, Lieutenant Calley, giving me a body count of approximately sixty-nine.

Q: Did you transmit that body count to headquarters of Task Force Barker?

A: Yes, sir....

Q: Now, did you at any time on the fifteenth of March or at any time on the sixteenth of March order or direct Lieutenant Calley to kill or waste any Vietnamese people?

A: No, sir.

Q: After you left the village and you were some distance from the village, did you, at any time, ever receive a radio message to return to the village of My Lai Four?

A: Yes, sir. . . . between fifteen-thirty, sixteen-thirty hours on the sixteenth of March. . . . I had received a radio communication from Major Calhoun and he instructed me to return back to the village of My Lai Four and to determine how many noncombatants had

been killed. I told Major Calhoun that I felt because of the distance involved of my having to return back to the village from my night defensive position, we would have to clear the area that we had just crossed from My Lai Four to our night position. We would have to clear it again for mines and booby traps. I felt that it would be best not to return. Also at this time, I had an indication that the Forty-Eighth VC Battalion, which was supposed to have been in the village of My Lai Four, had not been there. That there had been a number of noncombatants killed. And this is the other reason I did not want to return back to the village. At that time, Major Calhoun had instructed me to try to determine the number of innocent civilians that had been killed at the village of My Lai Four. I got my platoon leaders together and I asked them for a body count of innocent civilians that had been killed. The first platoon leader, Lieutenant Calley, told me in excess of fifty. Lieutenant Brooks, the second platoon leader, told me the like number. He said, I believe the like number of fifty or more." Lieutenant LaCross, the third platoon leader, gave me a body count of six. At that time, I--"Oh, my God, what is -- what happened?" I already had an indication that noncombatants had been killed. I did not know it was this large a magnitude and at that tie I made a remark to the platoon leaders that I had seen approximately twenty to twenty-eight, and that that was the body count that I was going to give Major Calhoun. I got on the task force command net. I told Major Calhoun that I had a body count of twenty to twenty eight noncombatants that had been killed. He said, I want you to go back into the village of My Lai Four and make an exact count of how many men, women, and children had been killed," and about that time, an individual using the call sign of Sabre Six broke into the conversation and said, Negative. What does Six," or What does Charlie Six say he has?" I said, "Twenty

to twenty eight. Sabre Six came back and says, "'That sounds about right. Don't send him back in there.

Q: Sabre Six is General Koster?

A: The call sign Sabre Six was the call sign of the division Commander of the Americal division, General Koster....

Q: Did Lieutenant Calley ever radio to you, at any time in the morning hours of sixteen March, that any villagers were slowing his progress?

A: No, sir.

Q: Did you ever issue an order to him to speed his progress toward a defensive position on the east side of My Lai Four?

A: Yes, sir.

Q: Did you ever radio any of your platoon leaders words in substance, "The party is over, the show is over, that is enough for today ?

A: No, sir. . . . I did place a cease-fire order to the platoon leaders to make sure that there were no innocent civilians or noncombatants being killed indiscriminately. This was done as I moved up to the area where the individual that had been wounded in the foot and after I had seen the twenty to twenty-eight people on the trail after we had evacuated the individual that had been wounded. I had received a transmission from Major Calhoun. I again relayed to the platoon leaders to cease fire, to make sure that no

noncombatants were being indiscriminately killed, and there was another time that I called forward to the first platoon, and I said, "Damn it, what is going on up there? I wanted all this firing stopped.

Q: With regard to the body count, what was the total body count that you reported as being a result of this operation?

A: The total body count that was reported for the operation was one hundred twenty-eight. this was a combined body count for Bravo and C Company. Bravo Company had, I think, forty to forty-five.

Q: What was your report as total body count?

A: The body count that I reported to the task force was between eighty and eighty-five

Q: Did you ever report to the task force headquarters anything about any prisoners that had been taken by C Company?

A: I reported to the task force that we had detained approximately twenty to thirty VC suspects.

Q: Was that true?

A: Yes, sir.

Q: And who detained those, where did you get that information?

A: The detainees that we picked up were in the second platoon, sir. It was on the northern portion of the village.

Q: Do you know what happened to those persons who were detained, in your own knowledge?

A: Once we began moving toward the east from the village, we came upon a group of civilians that had been rounded up. I estimate the number somewhere between eighty to ninety, I guess, that had been gathered. There were men, women, and children. I had my interpreter talk to them. We selected the ones that appeared to be Viet Cong suspects of military age. The women and children and the old Vietnamese males, I instructed Sergeant Phu to tell them to proceed from this area and go directly to the refugee center either at Son Thanh or Quang Ngai and report in to the ARVN adviser there and they would be taken care of. . .

Q: Was it generally know to you after -- immediately after -- sixteen March or after you left the village of My Lai four that many unarmed people had been killed in the village?

A: On the evening of the sixteenth of March, at the night defensive position, I became aware of the magnitude of the number of people that -- that there had been a large number of noncombatants that had been killed at the village of My Lai four. I was not to hear until sometime later how many or, you know, the great number of civilians that had been killed . . .

Q: Did you ever give an order in My Lai four, on sixteen March, over the radio or in person, to anyone that they should move the civilians out of the way, or get rid of them, or anything in substance like that?

A: No, sir.

Q: Did you ever give an order in substance to save enough civilians so that they could be utilized to clear the mine fields for the rest of the Pinkville operation?

A: No, sir.

Q: Now, immediately following the date sixteen March, did you ever make a statement to anyone, in substance, "I will go to jail for this ?

A: Yes, sir.

Q: And when was that?

A: Could have been possibly the night defensive position when I found out what had happened, and also a couple of days later at LZ-Dottie.

Q: All right. You testified that you made a radio transmission to the first platoon, in substance, "Damn it, what is going on up there?

A: Yes, sir.

Q: What prompted that?

A: I had received a -- I had placed out a cease-fire order to the platoon leaders. By a cease fire, I mean that they were no -- to make sure that there were no innocent civilians being killed. then I received a call from the task force S-three stating that he had a helicopter report that there was indiscriminate killing of innocent civilians. I again put this out. After I had started moving fromt the evacuation, I again put -- there was shooting over on the right-hand side. I then called the first platoon and told the, "Damn it, what is going on? I wanted to make sure that there were no innocent civilians being killed. . .

Q: Did you ever see any Vietnamese being shot at in the vicinity of the dust-off area?

A: Yes, sir.

Q: Would you relate that?

A: Yes, sir. Shortly after the dust-off, we started moving in an easterly direction along the east-west trail. I was in the middle of the command group, there was a Vietnamese male, a small boy, that started moving form the edge of the wood line in front of the command group. I caught the movement. I turned and started to raise my rifle. I seen that it was a child. I started to put it down. And I either uttered the words, "Get him! Get him! Stop him! Stop him! or "Don't shoot! Don't shoot! and somebody fired, the child fell....

Examination by Aubrey Daniel:

Q: Did he indicate he was having any difficulty in moving at the time?

A: No, sir.

Q: Did he indicate that he had gathered up any detainees at this time?

A: No, sir.

Q: Did you make any such inquiry?

A: No, sir....

Examination by George Latimer:

Q: Did you indicate at any time that the information you had been given in a briefing was false and that there were men, women, and children in the village?

A: I did not expect to find noncombatants in the village of May Lai Four

Q: Were you surprised when you did see them?

A: Yes, sir.

Q: Did you say anything to your lower command or your higher command about that?

A: No, sir.

Q: Why -- when you first shot the women, Captain Medina, you felt so horrified and sick about it, why, when you saw the small boy running by and you saw somebody kill him, and whey when you saw that body there, you didn't call somebody

and notify them what you had seen and make it positive that you had seen it and reported it to higher headquarters?

A: There were four reasons, sir.

Q: Let's have them.

A: Number one, sir, I did not expect to find any noncombatants in that area; I expected to go in and do combat with the Forty-Eighth VC Battalion. The woman-- I was shocked. It was the first human being that I had shot and I assumed that I did kill her. The four reasons that I did not report the shooting of any innocent or noncombatants at the village of My Lai four and the reason that I suppressed the information from the brigade commander when I was questioned are as follows: Number one, I realized that instead of going in and doing combat with an armed enemy, the intelligence information was faulty and we found nothing but women and children in the village of My Lai four, and , seeing what had happened, I realized exactly the disgrace that was being brought upon the Army uniform that I am very proud to wear. Number two, I also realized the repercussions that it would have against the United States of America. Three, my family, and number four, lastly, myself, sir.

Q: And those are the reasons you didn't report it?

A: Yes, sir.

Q: What has happened now because you didn't report it?

A: What has happened now, sir?

Q: Yes. Worse, isn't it?....

Q:: All right. Then you would expect any order given by you they would comply with, wouldn't you?

A: I would expect them to obey an order, yes, sir.

Q: And you would give the same attention and devotion to orders given to you by Colonel Barker, would you not?

A: Yes, sir.

Q: So, when you were told to burn the hootches, you went out and burned the hootches, did you not?

A: Yes, sir.

Summation of Aubrey Daniels for the Prosecution

The Court Martial of William L. Calley, Jr.

Fort Benning, Georgia, August 27, 1971

If it please the court, counsel of the accused, president, and gentlemen of the jury: First of all, I'd like to take this opportunity to thank you on behalf the United States government, Captain Partin, myself, and I'm sure for the court, and counsel for the defense for the patience which you've shown us throughout this long trial.

You have a job, gentlemen, a job which you took an oath to do, to take all this evidence and judge the credibility of each one of those witnesses, and then make a determination in your own mind as to what happened in the village of My Lai on 16 March, 1968.

At the beginning of this case, I outlined for you what we expected to prove, to give you the government's theory under which we expected and intended and have in fact established that the accused is guilty of the offenses with which he wa charged. t that time, I related to you that we would show that with respect to specification one of the charge that on 16 March 1968, when Charlie Company landed in My Lai on the western side of the village, they didn't receive any fire; they only found unresisting, unarmed men, women, children and babies. And I told you at that time with respect to specification one that Paul Meadlo and Dennis Conti and other members of the accused's platoon gathered up a group of not less than thirty individuals on the south side of the village, and that the accused came to Paul Meadlo and Dennis Conti and said, "Take care of them." And he left and he returned a few minutes later and he said, "Why haven't you

taken care of them?" In the meantime,. Dennis Conti and Paul Meadlo had that group of people, unarmed, unresisting men, women, children and babies, squatting there on that trail, and when Calley came back, they hadn't taken care of them, and he ordered Paul Meadlo to kill those people on that trail, and he in fact participated in the murder of those people. This was the first offense.

We told you that they then moved to an irrigation ditch on the eastern side of the village of My Lai, and there, the accused, along with members of his platoon did as the accused directed, gathered up more people, this time unarmed men, women, children, and babies, and put them in that irrigation ditch and shot them, and that he *(indicating defendant)* participated; and he caused their death and that they died.

After the accused, along with other members of his platoon, had killed the people in the ditch, he moved north and he came to a man that was dressed in white, a man that was described as a monk. The accused began to question this individual, and then the accused but t-stroked this man in the mouth, and then he blew half of his head off.

Shortly thereafter, the accused heard someone yell, "A child is getting away!" He ran back to that area, picked the child up, approximately two years old, threw the child in the ditch, shot, and killed him.

Those were the time sequences which I told you we would prove, those are the facts upon which these charges and specifications are based, and now you must resolve whether or not we have in fact established what we told you that we would prove to you when this trial began.

First of all, I would like to give you in summary form what the government submits that we have proved happened in the village of My Lai on 16 March 1968. Keep in mind that it is not your function to resolve the guilt or innocence of any other person who may have committed any other offense in the village of My Lai on 16 March 1968. Your function is solely to judge the guilt or innocence of the accused with respect to specific charges and specifications for which he is being tried.

Now, we have shown that when C Company landed on 16 March 1968, they did in fact land on the western side of the village of My Lai. All of the testimony is in agreement on that fact. We have also shown that the accused was in the platoon, a headquarters group, and a mortar platoon. We showed that when they landed, the accused's platoon assumed the position on the south side of the village. He had two squads and a platoon and a headquarters element for this operation. One squad was commanded by Sergeant Bacon. The first lift arrived at 0730 hours and it carried, as you will recall, after the first lift landed, elements of the First Platoon then secured portions of the LZ *(landing zone)* for the second lift to come in. Before the second lift landed, the First Platoon moved into the village. They received no fire from that village. None. The witnesses are in agreement on that fact.

Now the accused's platoon had Sergeant Mitchell's squad on the south side of the village, and it had Sergeant Bacon's squad on the north side of the village. And When they entered the village, the platoon, as you will recall, found no armed VC *(Vietcong).* All they found were old men, women, children, and babies. They began to gather up these thirty to forty unarmed, unresisting men, women, children, and babies, because they

weren't receiving any fire. Meadlo and Conti moved them out on the trail, and they made them squat down on the north-south trail.

Lieutenant Calley returned fifteen minutes later and said to Meadlo, "Why haven't you taken care of this group?" "Waste them." "I want them dead." "Kill them." The versions differ here slightly between the testimony of Sledge, Conti, and Meadlo regarding the actual words that Lieutenant Calley spoke. But, nonetheless, Lieutenant Calley then issued an order to Meadlo, and in fact Calley and Meadlo shot those people on the north-south trail.

Jim Dursi had gathered another group of people and he moved this other group of civilians along the southern edge of the village until he came to an irrigation ditch. And when he arrived at the irrigation ditch with his people, he was joined by Lieutenant Calley. And what happened there? Lieutenant Calley directed that those individuals, those groups of people, be placed into that irrigation ditch, and that they all would be shot by Meadlo and Dursi.

You recall the testimony of Paul Meadlo to Jim Dursi, "Why don't you shoot?' "Why don't you fire?" "I can't." 'I won't." Dennis Conti approached from the south and came up and observed Calley and Meadlo and Mitchell firing into that ditch and killing those people. And Conti moved north and set up a position. Robert Maples was in the area. He observed ten to fifteen people being put in that irrigation ditch by Lieutenant Calley. He observed Lieutenant Calley and Meadlo place the people in the irrigation ditch and fire into the people, but he didn't see the people come out.

Thomas Turner, you recall, testified that he, while he assumed the position to the north of the ditch, observed over a hundred people placed in that ditch during an hour to an hour-and-a-half period. These people were screaming and crying and that he passed Meadlo and Calley firing into that ditch as lie moved forward. And then you recall the testimony of Charles Sledge, that after that they moved north of the ditch where there was a man dressed in white, a fact which the accused admits, that Calley interrogated this individual; when the man refused to speak, Calley butt-stroked him with his rifle and then shot him. And then Charles Sledge testified that when he returned someone yelled out, 'There's a child getting away, a child getting away!" Lieutenant Calley returned to that area, picked up the child, threw the child in the ditch, and shot him.

Many of the facts which we have related to you as having been proved by this evidence beyond any reasonable doubt have not in fact been disputed by the defense and were in many cases supported by the defense's own evidence, including the testimony of the accused. . . .

We must prove that each of the victims died as a result of the act of the accused on 16 March 1968, and that they died pursuant to his ally having shot and killed them, or someone else at his direction ally having shot and killed these individuals.

We must prove that with respect to each of the specifications that the killings were in fact unlawful and committed without justification or excuse. We must prove that he not only had the specific intent to kill these individuals, but that he had a premeditated design to kill the individuals prior to the time he in fact killed them. This means under the law

that he formulated the idea in his mind to take the life before he in fact killed the human being.

First of all, let's take specification one of the charge. Let's look at the specific evidence with respect to that specification.

Judge Kennedy will explain to you that the government has two methods by which it can establish any fact. We can prove a fact beyond a reasonable doubt by presenting to you direct evidence of the fact, or we can prove it by circumstantial evidence. Direct evidence, of course, with respect to a killing would be where an individual actually sees one person shooting another, such as the testimony of Dennis Conti and Paul Meadlo; both testified that they saw the accused shoot the people. We can also prove it by circumstantial evidence, the circumstances involved. For example, in this case, the location of the bodies in relationship to where the accused was seen to those bodies, the fact that they were in his area of operation. We could prove the fact of death of a human being by circumstantial evidence from the nature of the wounds themselves without having a doctor perform an autopsy. So we had available to us both types of evidence, and we have presented both types of evidence to you.

First of all, let's review the direct evidence which we have presented to support specification one of the charge. You will recall the testimony of Dennis Conti---Dennis Conti, truck driver from Rhode Island. was a PFC [Private First Class) at the time of this operation. He was a member of the platoon. Dennis Conti testified that when he got off the helicopter he got separated from the command group, Lieutenant Calley and Charles Sledge, and that he entered the village and ran into Sergeant Bacon who told him that

he'd better catch up and get with the command group and get with Lieutenant Calley. That he reached the intersection of the north-south trail and located the command group. He began gathering up people from the hooches in that area at the direction of Lieutenant Calley. They gathered up at least thirty to forty unarmed men, women, and children at the north-south trail intersection. Conti testified that Lieutenant Calley came up and he told Meadlo, "Push the people out in the paddies," and so he and Paul Meadlo pushed the people out in the paddies and put them on the north-south trail and they guarded them like they thought they were supposed to do.

You recall that Dennis Conti said that he assumed a position on the south side of those people, and that Paul Meadlo was on the north side, and he put the people in a squatting position and that while they were waiting, he heard something in the hooches, to the south of where he was, and that lie left and went down there and found an old woman and child. He gathered these people up, came back and put them in with the group of people on the trail who were still waiting there. who weren't resisting, and who weren't armed. He then testified that Calley returned a few minutes later, and said, "Take care of these people," and Calley left. Calley returned shortly and said, "I thought I told you to take care of them." Calley said, "'I meant kill them." Then you recall Conti testified that he assumed the position to the rear of Meadlo and Calley, and watched as Calley and Meadlo fired into the group of people as he covered the treeline with his M-79 grenade launcher, not anting to participate. You recall lie testified that Paul Meadlo during the midst of this broke down and started crying, that Meadlo in fact attempted to push his weapon into Conti's hand, but Conti refused to take it, and that Calley and Meadlo shot and killed all of the people on the north-south trail.

Then we have the testimony of Paul Meadlo who also supports the charge, specification one. And what did Paul Meadlo say? He corroborates Dennis Conti, although not identically, sufficiently to show what actually transpired. He also testified that he gathered up thirty to forty people in the same location, at the same spot, and he was told to take these people to a designated area in a clearing. He said substantially the same thing that Dennis Conti said, 'Calley came up to me and he said, 'You know what to do with them." So the two of them corroborate each other's testimony. Meadlo also assumed, as did Conti, that Calley just meant for him and Conti to guard those people, but then Paul Meadlo says that about ten to fifteen minutes later, Calley returned and said, 'How come they're not dead yet?" Meadlo said, 'I didn't know we were supposed to kill them.' Calley said, 'I want them dead." And Calley, according to Meadlo, backed off twenty to thirty feet and fired into this group of people on full automatic, and that he directed Paul Meadlo to join him and Meadlo joined him. You recall that Meadlo said he was very emotionally upset at this time. He became hysterical. He started crying. But Conti didn't fire. . . .

Now, we have alleged in the specification that the accused killed not less than thirty human beings on the north-south trail. We went to great lengths at the early part of this trial to establish [that] the people shown in prosecution exhibit 12A [photograph of bodies] were in fact the people that Calley and Meadlo shot on the north-south trail. And we presented to you members from all sections of the company, from the mortar platoon and the headquarters element, from the Third platoon, who came to this area by various routes, and they all were able to identify that photograph and place it at that location.

The defense raised the question. "Why can't Dennis Conti identify prosecution exhibit 12 as in fact being the group?" Dennis Conti would not say that it was not the group. Why can't Paul Meadlo say that it is in fact the group? What about Paul Meadlo's emotional state at the time he killed those people? Do you think that he was going to look at that photograph and tell you, "That's the people that I killed?" Do you think that he could look at that photograph and admit to himself that that's the people that he killed? How about Dennis Conti? That's not pleasant for those men, gentlemen, and perhaps they have blocked that out of their minds, as you heard one psychiatrist say that an individual could do. And so we wanted to prove it to you by circumstantial evidence, that that is in fact the group of people that were shot there by people who were detached from this event, that Dennis Conti's verification of the location is well substantiated because Dennis Conti, as you will recall, testified that he has since returned to the village of My Lai, went into the village of My Lai on the ground, and in fact located the spot where these people we're killed on the north-south trail.

Do you think that Lieutenant Calley would tell you that that was the group of people? Do you think that he would tell you that that was the enemy that he shot? Do you think that he could justify that to you? Do you expect him to admit that that was the enemy he killed?

A lot of people testified concerning their estimates of how many people died and the bodies. Some would say five, some would say ten, some would say fifteen to twenty. But what's the best evidence that you have as to how many people died? The best evidence you have, gentlemen, is prosecution exhibit 12A of the numbers. Look at that

photograph when you go back into your deliberation. How many people are shown in that photograph? If you count the number of people in that photograph, you will find not less than twenty-five actually shown in the photograph, nine of which are clearly identified as children, and three of which are clearly identified as infants. Can there be any question about the fact that photograph has been well identified? You've heard twenty people testify, before you that they saw that group of bodies on the north-south trail. Twenty out of that company. There can be no doubt about the fact that those people were on the north-south trail and they were in fact dead. Would they be there that long and observed by that many people over that period of time with the wounds that they had and be alive? There is no doubt at all gentlemen, about the fact that Lieutenant Calley shot the people in prosecution exhibit 12A and that they are in fact dead and died as a result of his acts on 16 March 1968.

Let's turn to specification two, the shooting at the ditch. This occurred after the shooting on the north-south trail. Again, we have established this beyond any shadow of a doubt by both the direct and circumstantial evidence. . . .

What is the evidence relating to specification two of the additional charge? Charles Sledge testified that as they were leaving the ditch area, someone yelled out. "A child is getting away!" Sledge testified the accused went back, picked up the child, threw it in the ditch, and without hesitation, gentlemen, without hesitation, he raised his weapon and he looked down, and he fired. Sledge couldn't see where the baby was, but he threw it out in front of him, out in front of him in the ditch by the arm. Do you think he missed? Do

you think he wanted to miss? He didn't hesitate. He just pulled that weapon up and squeezed that trigger, and that baby was at the end of that barrel.

We submit that with respect to all of the specifications, we have clearly established the fact of death of the victims, and that the accused either killed them or he directed that they be killed. We have established those elements beyond any doubt.

Now, we have an additional element that we must satisfy as to all of the specifications: did the accused have the required criminal state of mind at the time he killed these individuals. To be guilty of premeditated murder, gentlemen, you have to intend to kill the victim. You have to intend that he die, and you have to form this intent just prior to the time that you accomplish that act. That's what the law requires. A split second. just so long as it's before you pull the trigger. If you make up your mind before you fire that the people that you are going to fire into are going to die, that is premeditation. You're going to be given an instruction on what constitutes premeditation, what constitutes premeditated design to kill, and you must find in this case that the accused did in fact premeditate with respect to each of the offenses with which he is charged.

How does the government perceive what a man is thinking? What Lieutenant Calley was thinking on the day in question? How do we show you that? First of all, we rely upon your own common sense and understanding and recognition of the way the human mind functions, recognition of the way people think and act. We rely upon the fact that you can take these facts, you can take his acts, his conduct, the observations of others, and find what he was thinking. We can prove it to you. We have proved it to you, because what is the evidence of a man's intent, what he intends to do? A man's actions

[are] the mirror of a man's mind. You can prove intent two ways, just as you can any other element of an offense, or any other fact. You can prove it by direct evidence, and what is that? When a man tells you what he is thinking, that is direct evidence of what he's thinking. You can prove it by circumstantial evidence; even though he doesn't tell you, you know by what he does what he intended.

Now, the defense in this case raised an issue regarding the accused's mental capacity to entertain the required criminal state of mind for these offenses. And you recall how they raised that issue. They raised it with the introduction of psychiatric testimony. They gave you the testimony of Dr. Crane and Dr. Hamman in an attempt to show that the accused's mind, his mental ability, was such that on the date in question and while he was in the village of My Lai he did not have the mental capacity to be able to premeditate, that is, to be able to get an idea in his mind he was going to kill somebody and then kill them after he got the idea. They presented the testimony of these two doctors. The military judge is going to instruct you that under the law, a man can be sane and yet still be suffering from a mental condition which would deprive him of the mental ability to premeditate, and that if you were to find that if there was a mental condition and then if it did in fact deprive the accused totally of his ability to premeditate, then he could not be found guilty of the offense of premeditated murder.

Dr. Crane, as you will recall, testified on the basis of a hypothetical question, which was read to him by Mr. Latimer and at the conclusion of that hypothetical question, he was asked to render an opinion regarding the accused's mental condition on the date of 16 March 1968. Dr. Crane was willing to give you a medical opinion on the basis of a

hypothetical question without ever having interviewed the accused, without having the benefit that you've had of observing him, listening to his testimony, without the benefit you've had of listening to what the witnesses who were actually there had to say about what transpired. I point this out to you in this regard as we go through this discussion of the testimony of the experts who testified medical opinions to assist you, gentlemen, in arriving at a medical diagnosis; in effect, a diagnosis of the accused's mental condition on the date in question. The law permits them, because they have expertise, to give you the benefit of their knowledge, but it does not relieve you of the ultimate responsibility of making the ultimate diagnosis, and you're not bound to accept the opinion of any doctor. You must make your diagnosis on the basis of all the facts.

Now, Dr. Crane stated under cross-examination that the accused did in fact have the mental ability to premeditate at the time of the offenses. He said Lieutenant Calley couldn't make a complex decision. We asked him for an example of a complex decision. He said, "Like going to the moon." You don't have to be a genius, gentlemen, to commit the offense of premeditated murder. You don't have to have above-average intelligence to be able to commit the offense of premeditated murder. You don't have to have a college degree. You've just got to have the ability to think and form that intent to kill somebody and form that intent in your mind before you kill them. And Dr. Crane said, "Well, if you're going to give me that literal definition" --and that literal definition, gentlemen, is the legal definition you must make your findings on --Calley had the mental ability to do it on the date in question. Dr. Crane in fact admitted that the accused could form the intent to kill before he pulled the trigger. Then Dr. Crane said that he didn't have the ability to form the specific intent to kill. Does that appear to be

inconsistent to you? What is "specific intent to kill"? it's no more than specific intent to kill as opposed to, say, specific intent to wound, as opposed to specific intent to just scaring, as opposed to specific intent just to take away someone's property. That's all it is. It means to take a human being's life. Specific intent to kill as opposed to specific intent to do something else.

They would die, and that he intended their death. He knew when he fired into that ditch that those people were going to die, that he was in fact killing them. Dr. Crane's opinion supports the government's position that he had the mental capacity. He had the mental capacity. He found that the accused was mentally healthy.

Then Dr. Hamman testified. I tell you, gentlemen, that the opinion that is given to you by any man is only as good as the facts upon which it is based, and the facts don't support the opinion of Dr. Hamman. Dr. Hamman, you will also recall, was not a combat psychiatrist. In fact, he said he hadn't read anything about combat psychiatry in two years. He didn't keep up in the field, he hadn't studied in the area. Doesn't Dr. Hamman's testimony indicate that Calley could think? Doesn't it indicate that he was thinking all sorts of things? Just consider all the factors in the accused's own testimony which demonstrate clearly that he not only had the mental ability to think, but that he was thinking on the date in question. He was thinking more complex things than just getting the idea to kill somebody and killing them. Look at the accused's testimony. No evidence that he was in a delusional state at the time. No evidence that he was not aware of what was transpiring around him. He knew where he was that day. He was able to tell you that. He was able to recognize his own men. He was able to give you their names.

He was able to recognize what they were doing. He was able to give you an estimate that the helicopter was fifteen feet off the ground, and that humped out at five feet. He was able to recognize the subordinate relationships and the relationships of his men to himself, and himself to Captain Medina. He could receive and transmit telephone calls, he could relay information to his men. He was oriented that day as to his direction of travel. He knew where he was going. He was able to communicate, to carry on conversations with others. He positioned his men. You recall him testifying he was positioning the machine guns, directing Sergeant Mitchell to position the machine guns. It was a tactical operation. He recognized there were helicopters in the area. He was able to recognize that there was a man brought to him for interrogation. He was able to rely upon his training in Vietnamese language. He was relying on his training. Anything wrong there with his mental processes?

As the psychiatric testimony of the government's witnesses shows, in some situations stress can make a man react more efficiently Did that happen here? Lieutenant Calley testified that while he was there that day, he was thinking about "the logistics of my men, throwing down the volume of fire or picking it up, breaking out into the open, keeping my men down, checking out the bunkers, keeping moving, keeping pre planned artillery plots at hand. I had two radios that I was working with, the air-to-ground push." He was thinking about all those things, gentlemen. They're complex. Is there any question about the fact that his mind was functioning as a normal human being on the date in question? Do those facts demonstrate someone who was befuddled? They show that he was thinking. If he could think about all those things, he had the mental ability to formulate

the attitude that when he pulled the trigger on his weapon, he intended to kill who he shot at, or when he gave the order to Meadlo that he intended for the people to die.

Now, on the issue of mental capacity, you heard from expert witnesses, Dr. Edwards, Dr. Jones, and Dr. Johnson. All of these men were members of the military, all of them were doctors from Walter Reed Army Hospital. You recall what their qualifications were. They were familiar with combat psychiatry. Dr. Johnson had been charged with the responsibility for the mental health program in Vietnam. They were aware of the studies in the area. Dr. Jones had served in Vietnam. He had written in the qualifications of those men with the qualifications of Dr. Hamman and Dr. Crane. I ask you to consider the circumstances under which they were brought here to testify. They didn't volunteer their services, gentlemen; they were directed to conduct an examination, an evaluation of the accused for this court, pursuant to its directive, and operated accordingly. In fact, you recall Dr. Johnson testifying, he wanted to be sure that this was done fairly and impartially, so much so that he disqualified one of his few board-certified psychiatrists from testifying, from sitting on this board, because he in fact had communication with me as trial counsel. You also recall that he testified that I concurred in that man not sitting. They gave you three good medical opinions regarding this man's mental condition, locally and reasonably arrived at. They conducted extensive evaluations of the accused in which the defense participated at Walter Reed. They had available to them the testimony that you heard, and before they rendered their opinions in court, they had available to them the observations of the accused as he testified from the witness stand, which is something which you also saw. And those three doctors' qualifications cannot be contested. They are of the unanimous opinion that the accused did in fact have the

mental capacity to premeditate on 16 March 1968, and was not suffering from any mental disease or defects. And you, gentlemen, yourself posed questions to these doctors regarding what factors they had taken into consideration in arriving at their opinion; did they consider the situation in which Lieutenant Calley was in possible stresses of combat upon him. They did. They considered all those facts. They relied upon their experience as soldiers and their knowledge of the military, their knowledge of commanders, their knowledge of the situation, and they gave you three opinions, all of which were the same. But you're not bound by any of that expert testimony, gentlemen. You reject it, as you can the testimony of any witness who has testified in this case. It's offered to help you in making your judgment as to the man's mental ability.

And perhaps the strongest testimony of all is what other people had to say about his actions on 16 March 1968, and what their opinions were of his mental condition at that time in relationship to days that they had observed him before this operation. That perhaps is the strongest evidence, because they were there and they had seen the accused before this operation. The law permits a lay person to give his opinion to you regarding a mental condition. You don't have to be a doctor to know that something is wrong with somebody. You, as a human being, can look around and determine what a man's mental state is, and the law recognizes that a lay witness can make such an observation, permits him to give you his testimony and his opinion regarding the man's mental condition.

It's interesting to note that when Paul Meadlo testified in this case, he was asked by Mr. Latimer, "Lieutenant Calley wasn't raving around that day, was he? ... He wasn't acting crazy?" Meadlo said, 'No." . . . .

Dennis Conti also had been serving under the accused, (and] had seen him on a daily basis for four to five months prior to this operation, testified that Calley seemed pretty calm, didn't appear to be upset, just like it was an everyday thing.

In addition to this evidence, the court has also permitted us to present to you evidence which showed that several weeks prior to this operation, a man was captured and interrogated by the accused for over twenty minutes. The accused beat the man during this interrogation, and at the end of the interrogation, shot him. You can also consider that in determining whether or not the accused had the mental ability to form the intent to kill before he killed.

Now, gentlemen, we have proved beyond any shadow of a doubt that the accused had the mental ability to think, to premeditate, and that he did in fact premeditate, and at the time he killed.

With respect to specification one, when you stand up to a group of people with an M-16 and pull that trigger, can you have any other intent? Let's analyze the evidence which demonstrates that the accused not only had the ability but he was in fact premeditating.

First of all, let's take Dennis Conti's version of what transpired. Dennis Conti said that Calley said to Meadlo, "Take care of them," and that when he returned he said that he meant to kill them. This was before any of them were ever killed. He formed the intent to kill them the first time he told Meadlo. He had that same intent fifteen minutes later when he returned. There can't be any clearer case than that. He only had to have the

intent a split second. We've got the accused's own statement. We've got direct evidence of what he intended when he made that statement.

Jim Dursi also heard him make the same statement, "Why haven't you wasted them yet?" Paul Meadlo, same statements. Charles Sledge said Calley ordered them to "Waste them." When he gave that order he intended for them to die, and that idea was in his mind before they died, before he pulled the trigger, or before Meadlo pulled the trigger. And that's all the law requires with respect to premeditation.

How about specification two? Don't the facts again clearly show what he intended? He ordered them shot. That means he had to get the idea before the shooting started.

And what about Thomas Turner's testimony that this took place over an hour and a half and they were separate groups?

There's testimony through Paul Meadlo and Jim Dursi, 'We've got another job to do." What does that show? And he made that statement before the people were ever placed in the ditch. Fifteen seconds before? One second is enough. How about the fact that he was observed changing magazines?

Gentlemen, the evidence that he in fact premeditated with respect to the people on the north-south trail and at the ditch is just overwhelming. There can be no doubt under those circumstances of what he intended when he started firing, and when he gave those orders. He intended for those people to die, and he formed that intent before he ever killed them, or ordered his men to kill them.

How about specification two of the additional charge? The man in white at the end of the ditch. You don't put that weapon up to somebody's head and pull the trigger. While he was putting it up to that man's head, he had to know that he was going to pull that trigger. He premeditated.

And when he threw that child in the ditch and he raised that rifle, he was premeditating again, and he was premeditating to kill.

And that's what the law requires that we prove. That's what we have proved beyond any doubt. . . .

Now, the military 'judge is going to Instruct you that in addition to the major offenses with which the accused is charged, that is, the offenses of premeditated murder, that if the government had failed in some way to establish one of the elements of those offenses, the accused could be found guilty of some lesser included offenses.

However, we have clearly shown in this case, and all the facts show that with respect to all of the specifications, that the accused acted with premeditation. And so I say to you that, having established this fact of premeditation with respect to all of these offenses, that the lesser included offenses are not in issue.

The judge instructed you regarding the offense of unpremeditated murder, which contains the same elements as the offense of premeditated murder with the exception that when the act of killing is committed, the intent to kill is simultaneous with the act of killing. There was no premeditation. He didn't think about it before he did it. It was a

spontaneous thing on his part. He formulated the idea of killing simultaneously with the act of killing, a sudden act.

I submit to you that the facts in this case, which establish clearly that the accused premeditated, would show that he in fact intended for these people to die before they were killed, negate any finding on your part of unpremeditated murder. We have established beyond a reasonable doubt that there was premeditation. How can a man give an order to someone to kill someone and not premeditate? The mere fact that he makes the statement before the deaths result show the premeditation. He had to think about it. He had to come up with the idea of killing' when he made the statement, which is the direct evidence of the intent, and we don't have to rely upon circumstantial evidence, even though that is abundant.

The judge will also instruct you that another possible, lesser included offense is the offense of voluntary manslaughter. The government submits again that we've shown premeditation. There is no need for you to consider ' the offense of voluntary manslaughter. If a person acts in a heat of sudden passion, caused by adequate provocation, the law recognizes that a man can be provoked to such an extent by the circumstances that he may kill before he has time to gain control of himself Again, a spontaneous reaction on his part. The facts negate spontaneous action, the descriptions of those people who were with the accused that he was calm, that he acted like he did on every other day, the time period over which these killings took place. The provocation is not there. His own testimony does not reflect that he was in a rage, that his mind was befuddled by rage, that he acted spontaneously. It shows that he was thinking. It shows

that he was premeditating. And where we have shown premeditation beyond any reasonable doubt, there can be no justification for rendering a finding showing any other state of mind than what the facts show.

We also have to establish with respect to each of these offenses that they were committed unlawfully without justification or excuse. In this regard, the accused while denying that he in fact committed the acts which we have alleged in specification one at the trail, he in fact has attempted to justify all of his acts that day under the theory that he was doing his duty, that he was following orders, orders that he had received from his company commander, Captain Medina. This was a combat operation, gentlemen, and the military judge will instruct you that the conduct of warfare is not wholly unregulated by law, and that nations, including this nation, have agreed to treaties which attempt to maintain certain basic fundamental humanitarian principles applicable in the conduct of warfare. And over a period of time these practices have dealt with the circumstances and the law concerning when human life may be justifiably taken as an act of war. The killing of [an] armed enemy in combat is certainly a justifiable act of war. It's the mission of the soldier to meet and close with and destroy the enemy. However, the law attempts to protect those persons who are noncombatants. Even those individuals who may have actually engaged in warfare, once they have surrendered. They are entitled to be treated humanely. They are entitled not to be summarily executed.

The military judge will instruct you that as a matter of law regardless of the loyalties, political views, or prior acts, people had the right to be treated as prisoners once captured until they are released, confined, or executed, but executed only in accordance with the

law and the established procedures by competent authority sitting in judgment of the detained or captured individual. A trial, gentlemen, a trial, like the accused has had in this case, a trial at which the guilt or innocence of these individuals can be determined.

He will instruct you that as a matter of law, summary execution is forbidden. He will also tell you that as a matter of law that under the evidence which we have presented in this case, that any hostile acts, or any support which the inhabitants of the village of My Lai may have given to the Vietcong or to the NVA at some time prior to 16 March, would not justify their summary execution. Nor would hostile acts even that day committed by an armed enemy unit have justified their summary execution, as a matter of law, if those individuals laid down their weapons, held up their arms, and surrendered themselves to the American forces.

He will tell you that as a matter of law, that if unresisting human beings were killed at My Lai while within the effective custody and control of our military forces, their deaths cannot be considered justified, and that any order to kill such people would be, as a matter of law, an illegal order.

We presented in our case in chief no evidence regarding what the orders were for this operation. We wanted to present to you the facts surrounding these deaths. We wanted to present to you, and show to you, show you clearly that the people that were killed in My Lai were unarmed, were unresisting, and offered no resistance to the accused on the date in question, and that they were summarily executed by him. There can be no justification for that. There is none under the law, the law which you have sworn to

apply in this case, even despite what your own personal feelings may be regarding this law.

You will be told as a matter of law that the obedience of a soldier is not the obedience of an automaton. When he puts on the American uniform, he still is under an obligation to think, to reason, and he is obliged to respond not as a machine but as a person and as a reasonable human being with a proper regard for human life, with the obligation to make moral decisions, with the obligation to know what is right and what is wrong under the circumstances with which he is faced and to act accordingly.

We submit to you in this case that the accused received in fact no order to have done what he did in My Lai on 16 March 1968. He cannot rely upon an order in the first instance, because there was no order to round up all those men, women, and children and summarily execute them. There was an order, yes, to meet and engage the Forty-eighth VC Battalion in My Lai. We submitted to you all the evidence regarding the pre operational planning for this operation. You heard what the mission of this operation was to meet and engage the armed enemy unit that they expected to be there. Is there anything unlawful about that order? On the night of 15 March, do you think that they anticipated or intended when they got to the village the next day there would be no one there with weapons, and all they would find would be old men, women, children, and babies, and that the mission was to go in and gather those people up and take them out on that trail and that ditch and shoot them? Do, you think that those were the orders on the night of 15 March? Do you think that that was the order that emanated in those task force briefings? There is no evidence to show that any order was given to summarily execute.

There is no evidence to show that there was an order given not to take prisoners. There was an order given to meet and engage an armed enemy unit, and this is the order that Captain Medina relayed to his men, to meet and engage the forty-eighth VC Battalion, and the defense's own witnesses testified to this, as have the govenment's.

The accused testified that he thought they would come in on a high speed combat assault, clear My Lai, and make a primary assault on Pinkville and go in there and neutralize Pinkville once and for all. Does that indicate summary execution of men, women, and children? Do you think that was the order issued on the fifteenth of March? Calley said after he received the platoon leaders' briefing that 'We were going to go in there and do sustained battle with the enemy and that we would stay with the enemy as long as we could maintain contact with him, and we would try to roll him up." That's what he thought on the night of 15 March.

Was Captain Medina justified in trying to arouse his men to engage the enemy the net day? Shouldn't he have told them, shouldn't he have made them aware of what they could expect? And they expected to meet an armed enemy unit.

And so I say to you that the evidence clearly shows that the accused cannot rely upon any order emanating out of any briefing on the fifteenth of March, 1968, to justify his acts, because no such order was given. Nor can the accused rely upon an order having been given to him the day of the operation. He has testified that he received an order from Captain Medina to 'waste' the group of Vietnamese that was detained, and he, gentlemen, alone has testified to that fact.

We have produced both RTOs who were members of that command group; neither one of them heard such an order given. You had the RTO from the Third Platoon, Steven Glimpse, who was on his radio that day. He heard no such order given. You had Jeffrey LaCross, who was the Third Platoon leader, who had no knowledge of such an order being given. You had Charles Sledge who was Lieutenant Calley's RTO; he had no such knowledge of an order being given. The accused and the accused alone said he received that order. You had Captain Medina testify before you under oath that he did not give that order. Do you think that the accused would have called Captain Medina and told him that "I have fifty, a hundred Vietnamese --men, women, and children-- none of whom have any weapons." And then would have received an order from his company commander to waste that many. Do you think that he called Captain Medina and told him what he had found in the village and how many people he had under his control, or what type of people they were, or what the circumstances were. He doesn't tell you that. He doesn't tell you, because he didn't do it. He didn't check, and perhaps his conduct is typified by his own statements to Charles Sledge after he talked to Lieutenant Thompson: "He don't like the way I'm running the show here, but I'm the boss." He was running that show, gentlemen, on his own initiative, why did the members of the First Platoon begin to round those people up? Even defense's own witness, Elmer Hanwood, testified that he started gathering them up, because he wasn't receiving any resistance from these people. "I wasn't going to shoot them," Hanwood said. 'They weren't doing anything to me." . . . .

And so, gentlemen, the acts are unjustifiable as a matter of law, the accused did not receive any order of any kind which directed him to summarily execute the people on the north-south trail, the over seventy people in that irrigation ditch, the man in white out

there at that irrigation ditch, or that child. Let's assume for the sake of argument that he had.

Let's assume that he got an order to waste unarmed, unresisting people in the village of My Lai on the sixteenth of March. The military judge will instruct you that even that is not a justification for his acts, if the accused knew that that order was unlawful. For one to follow such an order, [one] has adopted the same criminal intent of the man who issued it. You're not absolved of your responsibility by the order. There are just two men guilty as opposed to one. The responsibility is joint. He joins in the same criminal purpose when he accepts and follows an illegal order. He has the same criminal intent of the man who gave the order.

The accused testified that this was the second largest military operation he was ever on, that he did his duty that day, that he met and closed with the enemy. His testimony regarding the body count, the great emphasis that was placed on body count within the command, within his company. I ask you, gentlemen, if this was the great battle for the accused, if this was his great day in which he had an opportunity to meet and close with the enemy, wouldn't he have wanted to give a big body count, actual body count of the armed enemy soldiers that he had killed? But he doesn't. He can't even give you an estimate. If they were the enemy, he engaged in honorable combat that day. Do you believe that? And even if you were to find subjectively that the accused believed the order to be lawful, it is still not a defense, if a reasonable man under the same or similar circumstances would have known and should have known that any such order would have been unlawful-- a reasonable man, gentlemen, not Lieutenant Calley. A reasonable

man is the average man, the average lieutenant, the average platoon leader, with average training knowledge. Would he know that that order was illegal?

The reasonable man, gentlemen, is an objective standard. You represent the reasonable men under the law. The reasonable man charged with knowledge of the law to apply in a given situation. The reasonable man would know and should know, without any doubt, that under the circumstances in which he found himself on the sixteenth of March, 1968, that any order to gather up over thirty people on that north-south trail, and to summarily execute those people is unlawful. It can't be justified. A reasonable man would know that to put over seventy people in that irrigation ditch, like a bunch of cattle --men, women, children, and babies-- that to do that is unlawful. A reasonable man not only would know it, he should know it, and he could not rely upon any order to commit that, to absolve himself of criminal responsibility for that conduct.

There can be no justification, gentlemen, and there is none under the law, or under the facts of this case. We have established beyond reasonable doubt every element of every offense that we have charged, and the facts clearly demonstrate that those acts were unjustifiable and without excuse. We have carried our burden, and it now becomes your duty to render the only appropriate sentence, punishments, and adjudications you can make in this case, and that is to return findings of guilty of all of the charges and specifications. Thank you.

COURT-MARTIAL OF

WILLIAM L. CALLEY, JR.

Fort Benning, Georgia, March, 1971

INSTRUCTIONS FROM THE MILITARY JUDGE TO THE COURT MEMBERS IN

UNITED STATES vs. FIRST LIEUTENANT WILLIAM L. CALLEY, JR.

You have now heard all the evidence and listened to the argument of counsel. Following these instructions, this court will recess and you will retire to the deliberation room where you will deliberate and vote separately on each specification to determine whether LT. Calley is guilty as charged, guilty of one of the lesser offenses, or not guilty. Each of you must resolve the ultimate issue of guilt or innocence of each specification in accordance with the law and the evidence admitted in court. As I told you initially, it is my duty to instruct you on the law. It is your duty to determine the facts, apply the law to those facts and determine the guilt or innocence of LT. Calley.

You must bear in mind that under the law LT. Calley is presumed to be innocent of the charges against him. The fact that someone may have preferred charges against him, or the fact that charges have been referred to this court for trial is not evidence, and may not be considered by you for any purpose whatsoever. The burden of proof is and always remains upon the government to prove each and every element of the offenses charged beyond a reasonable doubt. . . .

LT. Calley is charged with four specifications alleging premeditated murder in violation of Article 118 of the Uniform Code of Military Justice. These offenses are alleged to have occurred on the same date in the village of My Lai (4), but each

specification alleges a separate offense, and proof that LT. Calley committed one offense may not be considered as proof that LT. Calley committed any other alleged offense. Each offense is separate and distinct from all of the other alleged offenses, and you must be satisfied beyond a reasonable doubt separately as to the elements of each offense. . . .

The elements of Specification 1 of the Charge are:

1. That an unknown number, but not less than thirty oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai (4), are dead.

2. That their death resulted from the act of the accused, by means of shooting them with a rifl6, on or about 16 March 1968, in the village of My Lai (4), Quang Ngai Province, Republic of Vietnam.

3. That the killing of the not less than thirty oriental human beings as I described them in the first element, by LT. Calley, was unlawful; and

4. That, at the time of the killings, LT. Calley had a premeditated design to kill.

The elements of Specification 2 of the Charge are:

1. That an unknown number but not less than seventy oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai (4), are dead.

2. That their death resulted from the act of the accused by means of shooting them with a rifle, on or about 16 March 1968, in the village of My Lai (4), Quang Ngai Province, Republic of Vietnam.

3. That the killing of not less than seventy oriental human beings, as I have described them in the first element, by LT. Calley was unlawful; and

4. That, at the time of the killings, LT. Calley had a premeditated deisgn to kill.

With regard to these two specifications only, you note that not less than thirty and not less than seventy oriental human beings are alleged as having been killed. The following instruction applies to both specifications under Charge 1 and to all lesser offenses of these two specifications that I will later instruct you upon:

In all instances where multiple deaths are alleged, two-thirds of you must be convinced beyond a reasonable doubt that the same oriental human beings are dead. For example, in connection with the alleged killings in the eastern portion of My Lai (4), three of you must be satisfied that oriental human beings in the north portion of the ditch were killed by LT. Calley but other dead human beings in the south portion were not, and three of you might be satisfied that human beings in the south portion were killed by LT. Calley but that individuals in the north portion were not. Thus two-thirds of you would not be agreed as to the same deaths. Therefore, I reiterate, that two-thirds of you must be satisfied beyond a reasonable doubt that the same identical oriental human beings are dead, and that they were killed by LT. Calley. Additionally, if you are satisfied beyond a reasonable doubt that LT. Calley is guilty of killing at least one, but not all of the oriental

human beings as alleged, then you must modify your findings so that each accurately reflects the number of oriental human beings killed by LT. Calley as to which two-thirds of you have no reasonable doubt. The rule as to identity of victims remains the same, of course.

You will note that the elements of both Specifications 1 and 2 of the Charge require you to find, in order to convict, that the deaths, if any, resulted from the act of the accused; you are advised that a person who actually commits an offense---here, causing death by shooting another person, with the intent which the law deems culpable---is called a principal. Likewise any person who counsels, commands, or procures another to commit an offense that is subsequently perpetrated in consequence of such counselling, command, or procuring is also a principal and is just as guilty of the offense as he would have been had he actually perpetrated the offense himself. His presence at the scene where the offense is committed is not essential.

The term "counsel" means to advise, recommend, or encourage. The term "command" imports an order given by one person to another, who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order. The term "procure" means to bring about, cause, effect, contrive, or induce. When the act counselled, commanded or procured by a person is actually done, the person who counselled, commanded, or procured is chargeable as a principal with all results that could have been expected to flow as a probable consequence from the act.

In this case the Government has introduced evidence that LT. Calley ordered Mr. Meadlo to "waste" a group of Vietnamese that Mr. Meadlo has testified he was guarding,

and that LT. Calley and Mr. Meadlo thereafter shot the people. This is the offense charged as Specification I of the Charge. LT. Calley admits giving an order somewhat similar to the one to which Mr. Meadlo has testified, but denies personal participation in the shooting described by Mr. Meadlo and others. LT. Calley also testified that he gave the order at a location different from that where the Government has sought to place it and that he has no knowledge of whether the group of people that he testified he ordered moved or "wasted" were actually killed. There are other conflicts in the evidence as to whether this event occurred at all and if so, where; and I will instruct you in a few moments on the role that location must play in your deliberation on this Specification. In accordance with my instructions on principals, however, I advise you that only if two-thirds of you are satisfied beyond reasonable doubt that charged victims died as the result of the same act or acts by LT. Calley---as a result of the alleged conversation with Mr. Meadlo, or by his own actions, or a combination of both, and that these acts made him a principle, may you consider the other elements of the offense charged in Specification 1 to determine guilt or innocence.

Similarly, in connection with Specification 2 of the Charge, you have heard conflicting evidence concerning LT. Calley's role in the killing of Vietnamese that allegedly were shot in a ditch on the eastern side of My Lai (4). In order to convict LT. Calley of all or a portion of the deaths as charged, two-thirds of you must be convinced beyond reasonable doubt that the victims included in any finding of guilty died as a result of the same act or acts by LT. Calley, and that these acts made him a principal as I have defined that term.

You must also find beyond reasonable doubt that, at the time of any act which you find to have made LT. Calley a principal, he had the intent required by law, as stated in the elements of the offense and defined in' these instructions. If you do not find that, beyond a reasonable doubt, then the act is not counselling, commanding, or procuring as required by law.

Both specifications of the Additional Charge require the personal action by LT. Calley as charged.

The elements of Specification I of the Additional Charge are:

1. That one oriental male human being, whose age and name is unknown, an occupant of the village of My Lai (4), is dead.

2. That his death resulted from the act of the accused by means of shooting him with a rifle on or about 16 March 1968, in the village of My Lai (4), Quang Ngai Province, Republic of Vietnam.

3. That the killing of the unknown male oriental human being, as I have described him in the first element, by LT. Calley, was unlawful; and

4. That at the time of the killing, LT. Calley had a premeditated design to kill.

The elements of Specification 2 of the Additional Charge are:

1. That one oriental human being, approximately two years of age, whose name and sex is unknown, an occupant of the village of My Lai (4), is dead.

2. That the death of this oriental human being resulted from the act of the accused by means of shooting that oriental human being with a rifle, on or about 16 March 1968, in the village of My Lai (4), Quang Ngai Province, Republic of Vietnam.

3. That the killing of this oriental human being, as I have described that person in the first element, by LT. Calley, was unlawful; and

4. That at the time of the killing LT. Calley had a premeditated design to kill.

Those are the elements that the Government must prove to your satisfaction beyond a reasonable doubt in order for you to convict LT. Calley of premeditated murder. . . .

You have heard the testimony that the village of My Lai (4) was under combat assault when it was initially entered, and you have heard testimony concerning the history of Company C, 1/20th Inf, American Division, and its other combat operations against the enemy. You have heard about the combat losses sustained by Task Force Barker and their inability to actually find and fix the enemy. You have also heard testimony concerning LT. Calley's role in these operations. These facts standing alone, or in conjunction with other facts, may reduce one or more of the charged offenses to that of voluntary manslaughter if you find, under the standards set out herein, that the killings occurred, but that LT. Calley was at the time of the killings in a state of fear, rage or passion and that this state was caused by adequate provocation. However, you are further instructed that if a sufficient cooling time elapses between the provocation and the killing to permit a reasonable man to collect his wits and regain self control so as not to kill, the

provocation will not reduce murder to voluntary manslaughter, even if the passion of the accused persisted throughout the killing.

Even if you find a sufficient cooling time, any passion found should still be considered in connection with those offenses as I have told you requires a "premeditated design to kill," which phrase was defined previously. At the time of the alleged killings, LT. Calley must have possessed sufficient mental capacity to entertain a "premeditated design to kill." An accused may not be found guilty of premeditated murder if, at the time of the killing, his mind was so befuddled by fear, rage, passion or any other condition that he could not or did not premeditate. The fact that the accused's mind may have been befuddled by rage, fear, passion or any other condition at the time of the alleged killings does not necessarily show that he was deprived of his ability to premeditate or that he in fact did not premeditate, but this, like all other issues, is a question that must be resolved by you. I will cover the matter of capacity to premeditate in greater detail subsequently. I call your attention to it now to acquaint you with the connection between a provoked passion and "premeditated design." If you find provoked passion in this case, but are satisfied beyond a reasonable doubt that a sufficient cooling off time had elapsed between the provocation and killing to permit a reasonable man time to collect his wits and regain self control so as not to kill, then the question presented for your determination is whether in light of the evidence of the accused's passion, he in fact entertained a premeditated design to kill at the time of the killing. Unless you are satisfied beyond a reasonable doubt that the accused entertained a premeditated design to kill as charged in each of the four specifications, you must find him not guilty of each specification to which such reasonable doubt exists; however, you may in this situation find him guilty of

unpremeditated murder, provided you are satisfied beyond a reasonable doubt as to the elements of that offense. . . .

As I previously instructed you, you must find the facts, and apply the law, as I give it, to the facts found. I now want to set out some of the questions which you must resolve in this case.

The government contends that the first killing occurred in the southerly portion of the village, in the vicinity of the intersection of the North-South trail. The government has offered direct and circumstantial evidence that LT. Calley ordered killed, and himself killed people at that time and place. Prosecution Exhibit 12A was offered in evidence as the picture of the persons killed by Mr. Meadlo and LT. Calley, acting personally or through directions given his subordinates, at that location. On the other hand, Mr. Meadlo states that these killings did occur prior to the killings at the ditch, but he does not know exactly where, in relation to the intersection of the North-South trail and he did not identify Prosecution Exhibit 12A. Mssrs. Conti, Dursi, and Sledge place this incident in the southern portion of the village, on or near a main trail, but are not in complete agreement on the details of the incident, and none identified 12A as a photograph of the scene. Mr. Haberle, who testified that he took the photo, said that he observed a group alive in that general location from a distance, but that all he found in the area photographed were the bodies shown in 12A. LT. Calley denies personally shooting anyone in conjunction with Mr. Meadlo prior to the incident at the ditch, although he does admit seeing Mr. Meadlo with a group of Vietnamese at the South-easterly portion of the village and admits telling Mr, Meadlo to get rid of them. Here is the problem

confronting you: First, you must determine whether the killings charged in Specification I of the Charge occurred prior to the incident at the ditch as the government alleges. Then if you decide that they did occur, you must determine if they occurred at the time and place as alleged by the government. In short, if you are not satisfied beyond a reasonable doubt that the killings occurred in the southern portion or near the southern edge of the village, in the vicinity of the North-South trail intersection, but instead conclude that they occurred elsewhere in the village, LT. Calley cannot be found guilty of Specification I of the Charge. However, in this case you might still consider this evidence in connection with LT. Calley's state of mind and intent to kill the persons at the ditch, if you are satisfied beyond a reasonable doubt that the ditch offense, Specification 2 of the Charge, occurred. As to the offense allegedly involving the male oriental human being, Specification I of the Additional Charge, the government has offered evidence, both direct and... circumstantial, that LT. Calley butt stroked and then shot this man in the head, blowing part of his head away. LT. Calley admits the butt stroking an individual of similar description but denies the shooting. If you are not satisfied beyond a reasonable doubt that LT. Calley shot and killed this man, he must be acquitted of this specification. . . .

An element of each of the offenses charged which the government must prove beyond a reasonable doubt is the fact of death of the victims. Like other elements of the offenses, it may be proved both by direct and circumstantial evidence. You have heard testimony from various individuals that the people they saw appeared dead. You have heard other testimony about the nature of the wounds. Dr. Lane, a pathologist, testified concerning the effects of the M-16 projectile on the human body, indicating that it fragments under

certain conditions and may not pass through the victim in such instances. Again, each of you must determine what inferences may logically be drawn from the evidence, applying your common sense and experience.

You have heard the testimony of Dr. Crane and Dr. Hamman, witnesses for the defense, and Dr. Edwards, Dr. Jones, Dr. Johnson, Dr. Lane, and Captain Horne, witnesses for the government, on psychiatry, pathology, and surveying. These persons are known in law as expert witnesses because they are more qualified in their respective fields of psychiatry, pathology, and surveying than ordinary men. You are advised that there is no rule of law that requires you to give controlling significance to their testimony merely because of their qualifications as expert witnesses. In fact, with regard to the testimony of the psychiatrists, the testimony of the expert witnesses for the defense may be in conflict with the expert witnesses for the government. You should, however, consider, with due regard for their qualifications, the testimony of each of these witnesses and give such weight thereto as in your fair judgment it reasonably deserves in the light of all the circumstances, including your own common knowledge and observations. . . .

Following this testimony I told you that you would ultimately have to decide the question of mental capacity, and I also admitted some additional evidence for the limited purpose of assisting you in arriving at your decision on this issue. Testimony was admitted conceming, the shooting. of a woman, allegedly shot by LT. Calley while she was walking along a paddy dike near the ditch at Mi Lai (4), and there was also testimony about the shooting of a man by a well several weeks prior to the 16 of March. Both of these matters, if you are convinced that they occurred, may be considered by you on the

issue of mental capacity. You have also heard considerable testimony concerning LT. Calley's background. The law recognizes that an Accused may be sane and yet, because of some underlying mental impairment or condition, be mentally incapable of entertaining a premeditated design to kill. You should therefore consider, in connection with all other relevant facts and circumstances, all evidence tending to show that LT. Calley may have been suffering from a mental impairment or condition of such consequence and degree that it deprived him of the ability to entertain the premeditated design to kin required in the offense of premeditated murder. The burden of proof is upon the government to establish the guilt of LT. Calley beyond a reasonable doubt. Unless, in light of all the evidence, you are satisfied beyond, a reasonable doubt that LT. Calley, on 16 March 1968, in the village of My Lai (4), at the time of each of these alleged offenses, was mentally capable of entertaining, and did in fact entertain, the premeditated design to kill required by law, you must find him not guilty of each premeditated murder offense for which you do not find premeditated design. You may, however, find LT. Calley guilty of any of the lesser offenses in issue, provided you are convinced beyond a reasonable doubt as to the elements of the lesser offense to which you reach a guilty finding, bearing in mind all these instructions. . . .

The final determination as to the weight of the evidence and credibility of the witnesses in this case rests solely with you. In determining the weight and value to be given to the testimony which you have heard, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate the witness' intelligence, the acuteness of his memory, his apparent candour, his appearance land deportment, his demeanour on the

witness stand, his friendships and prejudices and his character as to truth and veracity. For example, there is some evidence before you that Mr. Conti has a bad reputation for truth and veracity, some evidence that Mr. Conti used marihuana immediately before the assault on My Lai (4), and some evidence of misconduct by him at My Lai (4), allegedly terminated by LT. Calley. Mr. Conti denied using marihuana and denied the misconduct. Other witnesses were also questioned about these matters. All this testimony should be considered in connection with Mr. Conti's credibility. Mr. Sledge testified that he was convicted of a Peeping Tom offense and given a two year sentence when he was seventeen. Sentences exceeding one year are normally felonies. In any event, this is a matter that may affect his credibility. Captain Medina has testified that he is under charges for offenses allegedly occurring about the same time and place as the alleged offenses we are trying here. Moreover, Captain Medina has testified that he is charged with some of the same offenses as LT. Calley. These are matters that may affect his credibility, Mr. Meadlo, Captain Kotour, Mr. Boyce, and Sgt Shields received testimonial immunity before they testified at this trial. The Grant of testimonial immunity, to a witness means that nothing contained in that witness' testimony before this court can be used against him, nor may any evidence discovered as a result of his testimony here be used against him should he be tried subsequently for a similar offense. False testimony given under a grant of immunity is still the proper subject of perjury charges, however. The involvement of these individuals in the events at My Lai (4), necessitating a grant of immunity to compel their testimony, may be a matter affecting credibility, and may be considered by you. . . .

We next come to the area of acts done in accordance with the orders of a superior. If under my previous instructions, you find that people died at My Lai (4) on 16 March 1968, as charged--- which would include a finding that LT. Calley caused their deaths--- you must then consider whether LT. Calley's actions causing death were done pursuant to orders received by him. There is considerable evidence in the record on this point.

Captain Medina, you will recall, testified that he told his assembled officers and men that C Company had been selected to conduct a combat assault on My Lai (4), which intelligence indicated was the current location of the 48th VC Battalion; that they would probably be out-numbered two to one; that they could expect heavy resistance; that they would finally get an opportunity to engage and destroy the battalion which they had been chasing unsuccessfully, and which was responsible for all the mines, booby-traps and sniper fire they had received. He recalled telling his personnel that "innocent civilians or non-combatants" would be out of the village at market by the time of the assault; and that they had permission to, and were ordered to destroy the village of My Lai (4) by burning the hootches, killing the livestock, destroying the food crops, and closing the wells. He testified that he recalled being asked whether women and children could be killed, and that in response to that question he instructed his troops to use common sense, and that engagement of women and children was permissible if women or children engaged or tried to harm the American troops. He denied saying that everything in the village was to be killed.

LT. Calley testified that he attended the company briefing and that Captain Medina instructed the company to unite, fight together, and become extremely aggressive; that

the people in the area in which they had been operating were the enemy and had to be treated like enemy; that My Lai (4) was to be neutralized completely; that the area had been prepped by "psy war" methods; that all civilians had left the area and that anyone found there would be considered to be enemy; that everything in the village was to be destroyed during a high speed combat assault; and that no one was to be allowed to get in behind the advancing troops. Subsequent villages, through which they would be manoeuvring enroute to the primary assault on the 48th VC Battalion at Pinkville or My Lai (1), were to be treated in the same manner. He testified that at a platoon leaders' briefing after the company briefing, Captain Medina reemphasized that under no circumstances would they allow anyone to get behind them, and that nothing was to be left standing in these villages. LT. Calley also testified that while he was in the village of My Lai (4). on the eastern side, he twice received orders from Captain Medina: first to "hurry and get rid of the people and get into position that [he] was supposed to be in;" an thereafter, to stop searching the bunkers, to "waste the people..."

As I have mentioned a number of times, I am only calling your attention to some of the evidence to give you an indication of the variety of matters you might consider in resolving these questions. The evidence, as we are all aware, is voluminous; and you must decide what portions of it are relevant and credible to determine the issues presented to you. In determining what order, if any, LT. Calley acted under, if you find him to have acted, you should consider all the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and

effect to kill unresisting occupants of My Lai (4), you must determine whether LT. Calley actually knew those orders to be unlawful.

Knowledge on the part of any accused, like any other fact in issue, may be proved by circumstantial evidence that is by evidence of facts from which it may justifiably be inferred that LT. Calley had knowledge of the unlawfulness of the order which he has testified he followed. In determining whether or not LT. Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including LT. Calley's rank; educational background; OCS schooling; other training while in the Army., including Basic Training, and his training in Hawaii and Vietnam. his experience on prior operations involving contact with hostile and friendly Vietnamese; his age, and any other evidence tending to prove or disprove that on 16 March 1968, LT. Calley knew the order was unlawful. If you find beyond reasonable doubt, on the basis of all tho evidence, that LT. Calley actually knew the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus solely on LT. Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.

Think back to the events of 15 and 16 March 1968. Consider all the information which you find to have been given LT. Calley at the company briefing, at the platoon leaders' briefing, and during his conversation with Captain Medina before lift-off. Consider the gunship "prep" and any artillery he may have observed. Consider all the evidence which you find indicated what he could have heard and observed as he entered and made his way through the village to the. point where you find him to have first acted causing the deaths of occupants, if you find him to have so acted. Consider the situation which you find facing him at that point. Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found LT. Calley to have committed. Unless you are satisfied from the evidence, beyond reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit LT. Calley for committing acts done in accordance with the order.

In weighing the evidence you are expected to utilize your common sense and your knowledge, gained during your civilian and military experience, of human nature and the ways of the world.

I have told you this repeatedly and I want to reemphasize it: The final determination as to the weight of the evidence and the credibility of the witness in this case rests solely with you. I don't believe that I have done this, but if I have made any comment or in any manner seemed to indicate my opinion as to the guilt or innocence of LT. Calley, you

must disregard it, as you and you alone have the independent responsibility of deciding the ultimate issue as to the guilt or innocence of LT. Calley in accordance with the law as I have given it in these instructions, the evidence admitted in court, and your own conscience.

I will now cover the procedural rules that will be followed in your voting on the findings. . . .

As to the actual voting, each of you have an equal voice and vote in deliberating upon and deciding all questions pertaining to the guilt or innocence of LT. Calley. Needless to say, seniority of rank may not be employed in any manner. Judging from my observations of you gentlemen there is no danger of that occurring, but I do want to clearly point out that you each individually represents a separate, independent vote.

Additionally, you should have a full and free discussion among yourselves before any ballot is cast.

Voting on the findings must be accomplished by secret written ballot and each of you is required to vote. The order in which the several charges and specifications are to be voted on should be determined by the president, Colonel Ford, subject to objection by a majority of the court. Voting on the specifications under each charge must precede voting on that charge. Captain Salem is the junior member, and as such, it will be his function to collect and count the votes. This count will be checked by the president, Colonel Ford, who I will immediately announce the results of the ballot to the rest of

you. At no time will you be permitted to say how you or any other member of this military jury has voted.

It takes the concurrence of two-thirds of you to find LT. Calley guilty of any offense charged. Since there are six members, in order to convict LT. Calley of any offense, four of you would have to vote guilty.

UNITED STATES, Appellate v WILLIAM L. CALLEY, JR., First Lieutenant, U.S. Army, Appellant

No. 26,875

United States Court of Military Appeals

22 U.S.C.M.A. 534

December 21, 1973

QUINN, Judge; DUNCAN, Judge (concurring in the result); DARDEN, Chief Judge (dissenting).

QUINN, Judge:

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of May Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments.

We consider first whether the public attention given the charges was so pernicious as to prevent a fair trial for the accused. At the trial, defense counsel moved to dismiss all the charges on the ground that the pretrial publicity made it impossible for the Government to accord the accused a fair trial. The motion was denied. It is contended that the ruling was wrong.

The defense asserts, and the Government concedes, that the pretrial publicity was massive. The defense perceives the publicity as virulent and vicious. At trial, it submitted a vast array of newspaper stories, copies of national news magazines, transcripts of television interviews, and editorial comment. Counsel also referred to comments by the President in which he alluded to the deaths as a "massacre" and to similar remarks by the Secretary of State, the Secretary of Defense, the Secretary of the Army, and various members of Congress. Before us, defense counsel contend that the decisions of the United States Supreme Court in Marshall v United States, 360 US 310 (1959), Irvin v Dowd, 366 US 717 (1961), and Sheppard v Maxwell, 384 US 333 (1966) require reversal of this conviction. In our opinion, neither the cited cases, nor others dealing with pretrial publicity and its effect upon an accused's constitutional right to a fair trial, mandate that result.

Under our constitutional system of government and individual rights, the exercise of a constitutional right by one person can affect the constitutional right of another. Thus, the First Amendment guarantees to the public and the news media the right to comment on and discuss impending or pending criminal prosecutions. The content of the comments can pose a danger to the right of an accused to the fair trial assured by the Due Process

clause of the Fifth Amendment. The accommodation of such competing rights has been, and will continue to be, a challenge to the courts. As we construe the Supreme Court's decisions in this area, the trier of the facts, and more particularly, a juror, is not disqualified just because he has been exposed to pretrial publicity or even has formulated an opinion as to the guilt or innocence of an accused on the basis of his exposure. "[I]f the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court," he is qualified to serve. Irvin v Dowd, supra at 723. The difficult is that sometimes the impact of the quantity and character of pretrial publicity is so patently profound that the juror's personal belief in his impartiality is not sufficient to overcome the likelihood of bias, as assessed by the court. *Id.* at 728; see also United States v Deain, 5 USCMA 44, 17 CMR 44 (1954). Our task, therefore, is not merely to ascertain that there was widespread publicity adverse to the accused, but to judge whether it was of a kind that inevitably had to influence the court members against the accused, irrespective of their good-faith disclaimers that they could, and would, determine his guilt from the evidence presented to them in open court, fairly and impartially.

We have reviewed the material submitted to support the defense argument on the issue. In contrast to the publicity in some of the cases cited, most of the matter is factual and impersonal in the attribution of guilt. Many accounts note that the accused had not been tried and the question of his culpability remained undetermined by the standard of American law. A number of editorials appear to regard the tragedy as another reason to deplore or oppose our participation in the war in Vietnam. A considerable amount of the material is favorable to Lieutenant Calley; some stories were largely expressions of sympathy.

First official government statements were to the effect that a full investigation would be conducted to determine whether the killings took place and, if so, to establish the identity of those responsible. Later statements described what occurred at My Lai as a massacre and promised that those who perpetrated it would be brought to justice. By the time of the trial few persons in the United States who read, watched or listened to the daily news would not have been convinced that many Vietnamese civilians, including women and children, had been killed during the My Lai operation. It is by no means certain, however, that the conviction that people had died included a judgment that Lieutenant Calley was criminally responsible for those deaths. Our attention has not been called to any official statement or report that demanded Lieutenant Calley's conviction as the guilty party.

Unlike the situation in the *Sheppard* case, neither the trial judge nor government counsel ignored the potentially adverse effect of the extensive publicity. In pretrial proceedings, the prosecution labored jointly with the defense to minimize the effects of the publicity. The military judge issued special orders to prospective witnesses to curb public discussion of the case and to insulate them from the influence of possible newspaper, magazine, radio and television reports of the case. At trial, the judge was exceedingly liberal in the scope of the voir dire of the court members and in bases for challenge for cause, but defense counsel challenged only two members because of exposure to the pretrial publicity.

We have carefully examined the extensive voir dire of the court members in the light of the pretrial materials submitted to us and we are satisfied that none of the court members had formed unalterable opinions about Lieutenant Calley's guilt from the publicity to

which they had been exposed and that the total impact of that publicity does not oppose the individual declaration by each member retained on the court that he could, fairly and impartially, decide whether Lieutenant Calley was guilty of any crime upon the evidence presented in open court. Irvin v Dowd, supra; Reynolds v United States, 98 US 145, 146 (1879). We conclude that this assignment of error has no merit.

In his second assignment of error the accused contends that the evidence is insufficient to establish his guilt beyond a reasonable doubt. Summarized, the pertinent evidence is as follows:

Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. In that role it would assault and neutralize May Lai 4, 5, and 6 and then mass for an assault on My Lai, 1. Intelligence reports indicated that the unit would be

opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his troops that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense." However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing -- men, women, children, and animals -- and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. This platoon formed a defense perimeter until the remainder of the force was landed. The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mothers' arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the

platoon. On being told that a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told him, "'You know what to do,'" and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed. Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, "'We got another job to do, Meadlo,'" and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With his radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice or *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation.

In assessing the sufficiency of the evidence to support findings of guilty, we cannot reevaluate the credibility of the witnesses or resolve conflicts in their testimony and thus decide anew whether the accused's guilt was established beyond a reasonable doubt. Our function is more limited; it is to determine whether the record contains enough evidence for the triers of the facts to find beyond a reasonable doubt each element of the offenses involved. United States v Papenheim, 19 USCMA 203, 41 CMR 203 (1970); United States v Wilson, 13 USCMA 670, 33 CMR 202 (1963).

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, at 788-91.

While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms . . . is murder."

Digest of Opinions of the Judge Advocates General of the Army, 1912, at 1074-75 n. 3.

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard

to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us.

At trial, Calley's principal defense was that he acted in execution of Captain Medina's order to kill everyone in My Lai 4. Appellate defense counsel urge this defense as the most important factor in assessment of the legal sufficiency of the evidence. The argument, however, is inapplicable to whether the evidence is *legally* sufficient. Captain Medina denied that he issued any such order, either during the previous day's briefing or on the date the killings were carried out. Resolution of the conflict between his testimony and that of the accused was for the triers of the facts. United States v Guerra, 13 USCMA 463, 32 CMR 463 (1963). The general findings of guilty, with exceptions as to the number of persons killed, does not indicate whether the court members found that Captain Medina did not issue the alleged order to kill, or whether, if he did, the court members believed that the accused knew the order was illegal. For the purpose of the legal sufficiency of the evidence, the record supports the findings of guilty.

In the third assignment of error, appellate defense counsel assert gross deficiencies in the military judge's instructions to the court members. Only two assertions merit discussion. One contention is that the judge should have, but did not, advise the court members of the necessity to find the existence of "malice aforethought" in connection with the murder charges; the second allegation is that the defense of compliance with superior orders was not properly submitted to the court members.

The existence *vel non* of malice, say appellate defense counsel, is the factor that distinguishes murder from manslaughter. See United States v Judd, 10 USCMA 113, 27

CMR 187 (1959). They argue that malice is an indispensable element of murder and must be the subject of a specific instruction. In support, they rely upon language in our opinion in United States v Roman, 1 USCMA 244, 2 CMR 150 (1952).

Roman involved a conviction of murder under Article of War 92, which provided for punishment of any person subject to military law "found guilty of murder." As murder was not further defined in the Article, it was necessary to refer to the common law element of malice in the instructions to the court members in order to distinguish murder from manslaughter. United States v Roman, supra; *cf.* United States v Judd, supra. In enactment of the Uniform Code of Military Justice, Congress eliminated malice as an element of murder by codifying the common circumstances under which that state of mind was deemed to be present. Hearings on HR 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess. 1246-1248 (1949); HR Rep No 491, 81st Cong, 1st Sess 3 (1949). One of the stated purposes of the Code was the "listing and definition of offenses, redrafted and rephrased in modern legislative language." S Rep No 486, 81st Cong, 1st Sess 2 (1949). That purpose was accomplished by defining murder as the unlawful killing of a human being, without justification or excuse. Article 118, Uniform Code of Military Justice, 10 USC § 918. Article 118 also provides that murder is committed if the person, intending to kill or inflict grievous bodily harm, was engaged in an inherently dangerous act, or was engaged in the perpetration or attempted perpetration of certain felonies. In each of these instances before enactment of the Uniform Code, malice was deemed to exist and the homicide was murder. The Code language made it unnecessary that the court members be instructed in the earlier terminology of "malice aforethought." Now, the conditions and states of mind that must

be the subject of instructions have been declared by Congress; they do not require reference to malice itself. *Cf.* United States v Craig, 2 USCMA 650, 10 CMR 148 (1953).

The trial judge delineated the elements of premeditated murder for the court members in accordance with the statutory language. He instructed them that to convict Lieutenant Calley, they must be convinced beyond a reasonable doubt that the victims were dead; that their respective deaths resulted from specified acts of the accused; that the killings were unlawful; and that Calley acted with a premeditated design to kill. The judge defined accurately the meaning of an unlawful killing and the meaning of a "premeditated design to kill." These instructions comported fully with requirements of existing law for the offense of premeditated murder, and neither statute nor judicial precedent requires that reference also be made to the pre-Code concept of malice.

We turn to the contention that the judge erred in his submission of the defense of superior orders to the court. After fairly summarizing the evidence, the judge gave the following instructions pertinent to the issue:

The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killings justifiable in this case. The law attempts to project whose persons not actually engaged in warfare, however; and limits the circumstances under which their lives may be taken.

Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views, or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established

procedures, by competent authority sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law. Further, it's clear under the evidence presented in this case, that hostile acts or support of the enemy North Vietnamese or Viet Cong forces by inhabitants of My Lai (4) at some time prior to 16 March 1968, would not justify the summary execution of all or a part of the occupants of My Lai (4) on 16 March, nor would hostile acts committed that day, if, following the hostility, the belligerents surrendered or were captured by our forces. I therefore instruct you, as a matter of law, that if unresisting human beings were killed to My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, *that order would be an illegal order.*

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

. . . In determining what orders, if any, Lieutenant Calley acted under, if you find him to have acted, you should consider all of the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and effect to kill unresisting occupants of My Lai (4), you must determine whether Lieutenant Calley actually knew those orders to be unlawful.

. . . In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including basic training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful. If you find beyond a reasonable doubt, on the basis of all the evidence, that *Lieutenant Calley actually knew* the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful. You deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.*

Think back to the events of 15 and 16 March 1968. . . . Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lieutenant Calley to have committed. Unless you are satisfied from the evidence, beyond a reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lieutenant Calley for committing acts done in accordance with the order. (Emphasis added.)

Appellate defense counsel contend that these instructions are prejudicially erroneous in that they require the court members to determine that Lieutenant Calley knew that an order to kill human beings in the circumstances under which he killed was illegal by the standard of whether "a man of ordinary sense and understanding" would know the order was illegal. They urge us to adopt as the governing test whether the order is so palpably or manifestly illegal that a person of "the commonest understanding" would be aware of its illegality. They maintain the standard stated by the judge is too strict and unjust; that it

confronts members of the armed forces who are not persons of ordinary sense and understanding with the dilemma of choosing between the penalty of death for disobedience of an order in time of war on the one hand and the equally serious punishment for obedience on the other. Some thoughtful commentators on military law have presented much the same argument. n1

n1 In the words of one author: "If the standard of reasonableness continues to be applied, we run the unacceptable risk of applying serious punishment to one whose only crime is the slowness of his wit or his stupidity. The soldier, who honestly believes that he must obey an order to kill and is punished for it, is convicted not of murder but of simple negligence." Finkelstein, Duty to Obey as a Defense, March 9, 1970 (unpublished essay, Army War College).See also L. Norene, Obedience to Orders as a Defense to a Criminal Act, March 1971 (unpublished thesis presented to The Judge Advocate General's School, U.S. Army).

The "ordinary sense and understanding" standard is set forth in the present Manual for Courts-Martial, United States, 1969 (Rev) and was the standard accepted by this Court in United States v Schultz, 18 USCMA 133, 39 CMR 133 (1969) and United States v Keenan, 18 USCMA 108, 39 CMR 108 (1969). It appeared as early as 1917. Manual for Courts-Martial, U.S. Army, 1917, paragraph 442. Apparently, it originated in a quotation from F. Wharton, Homicide § 485 (3d ed. 1907). Wharton's authority is Riggs v State, 3 Coldwell 85, 91 American Decisions 272, 273 (Tenn 1866), in which the court approved a charge to the jury as follows:

"[I]n its substance being clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order."

Other courts have used other language to define the substance of the defense. Typical is McCall v McDowell, 15 F Cas 1235, 1240 (CCD Cal 1867), in which the court said:

But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. . . . The first duty of a solider is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and solider were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Colonel William Winthrop, the leading American commentator on military law, notes:

But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination,

and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face,* he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness . . . .*

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate defense counsel acknowledge that rule of law and its continued viability, but they say that Lieutenant Calley should not be held accountable for the men, women and children he killed because the court-martial could have found that he was a person of "commonest understanding" and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. The United States Supreme Court has pointed out that "[t]he rule that 'ignorance of the law will not excuse' [a positive act that constitutes a crime] . . . is deep in our law." Lambert v California, 355 US 225, 228 (1957). An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is, in my opinion, so palpably illegal that whatever concept ional difference there may be between a person of "commonest understanding" and a person of "common understanding," that difference could not have had any "impact on a court of lay members receiving the respective wordings in instructions," as appellate defense counsel contend. In my judgment, there is no possibility of prejudice to Lieutenant Calley in the trial judge's reliance upon the established standard of excuse of criminal conduct, rather than the standard of "commonest understanding" presented by the defense, or by the new variable test postulated in the dissent, which, with the inclusion of such factors for consideration as grade and experience, would appear to exact a higher standard of understanding from Lieutenant Calley than that of the person of ordinary understanding.

In summary, as reflected in the record, the judge was capable and fair, and dedicated to assuring the accused a trial on the merits as provided by law; his instructions on all issues were comprehensive and correct. Lieutenant Calley was given every consideration to which he was entitled, and perhaps more. We are impressed with the absence of bias or prejudice on the part of the court members. They were instructed to determine the *truth* according to the law and his they did with due deliberation and full consideration of the

evidence. Their findings of guilty represent the truth of the facts as they determined them to be and there is substantial evidence to support those findings. No mistakes of procedure cast doubt upon them.

Consequently, the decision of the Court of Military Review is affirmed.

DUNCAN, Judge (concurring in the result):

My difference of opinion from Judge Quinn's view of the defense of obedience to orders is narrow. The issue of obedience to orders was raised in defense by the evidence. Contrary to Judge Quinn, I do not consider that a presumption arose that the appellant knew he could not kill the people involved. The Government, as I see it, is not entitled to a presumption of what the appellant knew of the illegality of an order. It is a matter for the fact finders under proper instructions.

Paragraph 216, Manual for Courts-Martial, United States, 1969 (Rev), provides for special defenses: excuse because of accident or misadventure; self-defense; entrapment; coercion or duress; physical or financial inability; and obedience to apparently lawful orders. Subparagraph *d* of paragraph 216 is as follows:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

The military judge clearly instructed the members pursuant to this provision of the Manual. The heart of the issue is whether, under the circumstances of this case, he should have abandoned the Manual standard and fashioned another. The defense urges a purely subjective standard; the dissent herein yet another. I suggest that there are important general as well as certain specific considerations which convince me that the standard should not be abandoned. The process of promulgating Manual provisions is geared to produce requirements for the system only after most serious reflection by knowledgeable and concerned personnel. These persons have full regard for the needs of the armed forces and genuine concern for the plight of one accused. Those who prepared the Manual provision and the President of the United States, the Commander-in-Chief, who approved and made the provision a part of our law, were aware that disobedience to orders is the anathema to an efficient military force. Judge Quinn points out that this Court has established as precedent the applicability of the special defense upon proof adduced pursuant to the Manual standard. These are important general reasons for not aborting a standard that has been long in existence and often used.

It is urged that in using the Manual test of "a man of ordinary sense and understanding" those persons at the lowest end of the scale of intelligence and experience in the services may suffer conviction while those more intelligent and experienced would possess faculties which would cause them to abjure the order with impunity. Such an argument has some attraction but in my view falls short of that which should impel a court to replace that which is provided to us as law.

It appears to me that all tests which measure an accused's conduct by an objective standard -- whether it is the test of "palpable illegality to the commonest understanding" or whether the test establishes a set of profile considerations by which to measure the accused's ability to assess the legality of the order -- are less than perfect, and they have a certain potential for injustice to the member having the slowest wit and quickest obedience. Obviously the higher the standard, the likelihood is that fewer persons will be able to measure up to it. Knowledge of the fact that there are other standards that are arguably more fair does not convince me that the standard used herein is unfair, on its face, or as applied to Lieutenant Calley.

Perhaps a new standard, such as the dissent suggests, has merit; however, I would leave that for the legislative authority or for the cause where the record demonstrates harm from the instructions given. I perceive none in this case. The general verdict in this case implies that the jury believed a man of ordinary sense and understanding would have known the order in question to be illegal. n4 Even conceding argued that this issue should have been resolved under instructions requiring a finding that almost every member of the armed forces would have immediately recognized that the order was unlawful, as well as a finding that as a consequence of his age, grade, intelligence, experience, and training, Lieutenant Calley should have recognized the order's illegality, I do not believe the result in this case would have been different.

n4 This assumes that the jury found that the order the appellant contends he obeyed was given.

I believe the trial judge to have been correct in his denial of the motion to dismiss the charges for the reason that pretrial publicity made it impossible for the Government to accord the accused a fair trial.

Both the principal opinion and the analysis of the Court of Military Review state that in the enactment of the Uniform Code of Military Justice Congress has, in effect, codified the requirement of malice aforethought by defining murder as the unlawful killing of a human being, without justification or excuse. Article 118 UCMJ, 10 USC § 918. It should also be noted that in the case at bar the members of the panel were charged that a finding that the homicides were without justification or excuse was necessary to convict for premeditated murder. Furthermore, I cannot say that the evidence lacks sufficiency to convict in respect to any of the charges.

DARDEN, Chief Judge (dissenting):

Although the charge the military judge gave on the defense of superior orders was not inconsistent with the Manual treatment of this subject, I believe the Manual provision is too strict in a combat environment. Among other things, this standard permits serious punishment of persons whose training and attitude incline them either to be enthusiastic about compliance with orders or not to challenge the authority of their superiors. The standard also permits conviction of members who are not persons of ordinary sense and understanding.

The principal opinion has accurately traced the history of the current standard. Since this Manual provision is one of substantive law rather than one relating to procedure or modes

of proof, the Manual rule is not binding on this Court, which has the responsibility for determining the principles that govern justification in the law of homicide. United States v Smith, 13 USCMA 105, 32 CMR 105 (1962). My impression is that the weight of authority, including the commentators whose articles are mentioned in the principal opinion, supports a more liberal approach to the defense of superior orders. Under this approach, superior orders should constitute a defense except "in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal."

While this test is phrased in language that now seems "somewhat archaic and ungrammatical," the test recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by "those persons at the lowest end of the scale of intelligence and experience in the services." This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part.

It is true that the standard of a "reasonable man" is used in other areas of military criminal law, *e.g.*, in connection with the provocation necessary to reduce murder to voluntary manslaughter; what constitutes an honest and reasonable mistake; and, indirectly, in

connection with involuntary manslaughter. But in none of these instances do we have the countervailing consideration of avoiding the subversion of obedience to discipline in combat by encouraging a member to weigh the legality of an order or whether the superior had the authority to issue it. See Martin v Mott, 25 US 19, 30 (1827).

The preservation of human life is, of course, or surpassing importance. To accomplish such preservation, members of the armed forces must be held to standards of conduct that will permit punishment of atrocities and enable this nation to follow civilized concepts of warfare. In defending the current standard, the Army Court of Military Review expressed the view that:

Heed must be given not only to the subjective innocence-through-ignorance in the soldier, but to the consequences for his victims. Also, barbarism tends to invite reprisal to the detriment of our own force or disrepute which interferes with the achievement of war aims, even though the barbaric acts were preceded by orders for their commission. Casting the defense of obedience to orders solely in subjective terms of *mens rea* would operate practically to abrogate those objective restraints which are essential to functioning rules of war. United States v Calley, 46 CMR 1131, 1184 (ACMR 1973).

I do not disagree with these comments. But while humanitarian considerations compel us to consider the impact of actions by members of our armed forces on citizens of other nations, I am also convinced that the phrasing of the defense of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty.

The test of palpable illegality to the commonest understanding properly balances punishment for the obedience of an obviously illegal order against protection to an accused for following his elementary duty of obeying his superiors. Such a test reinforces the need for obedience as an essential element of military discipline by broadly protecting the soldier who has been effectively trained to look to his superiors for direction. It also promotes fairness by permitting the military jury to consider the particular accused's intelligence, grade, training, and other elements directly related to the issue of whether he should have known an order was illegal. Finally, that test imputes such knowledge to an accused not as a result of simple negligence but on the much stronger circumstantial concept that almost anyone in the armed forces would have immediately recognized that the order was palpably illegal.

I would adopt this standard as the correct instruction for the jury when the defense of superior orders is in issue. Because the original case language is archaic and somewhat ungrammatical, I would rephrase it to require that the military jury be instructed that, despite his asserted defense of superior orders, an accused may be held criminally accountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognized that the order was unlawful, and (2) that the accused should have recognized the order's illegality as a consequence of his age, grade, intelligence, experience, and training.

The temptation is to say that even under this new formulation Lieutenant Calley would have been found guilty. No matter how such a position is phrased, essentially it means

that the appellate judge rather than the military jury is functioning as a fact finder. My reaction to this has been expressed by the former chief justice of the California Supreme Court in these words:

If an erroneous instruction or an erroneous failure to give an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict.

The same authority also expressed this thought:

The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal of saving time and money. Unfortunately it does not measure up to accepted standards of fairness.

In the instant case, Lieutenant Calley's testimony placed the defense of superior orders in issue, even though he conceded that he knew prisoners were normally to be treated with respect and that the unit's normal practice was to interrogate Vietnamese villagers, release those who could account for themselves, and evacuate those suspected of being a part of the enemy forces. Although crucial parts of his testimony were sharply contested, according to Lieutenant Calley, (1) he had received a briefing before the assault in which he was instructed that every living thing in the village was to be killed, including women and children; (2) he was informed that speed was important in securing the village and

moving forward; (3) he was ordered that under no circumstances were any Vietnamese to be allowed to stay behind the lines of his forces; (4) the residents of the village who were taken into custody were hindering the progress of his platoon in taking up the position it was to occupy; and (5) when he informed Captain Medina of this hindrance, he was ordered to kill the villagers and to move his platoon to a proper position.

In addition to the briefing, Lieutenant Calley's experience in the Pinkville area caused him to know that, in the past, when villagers had been left behind his unit, the unit had immediately received sniper fire from the rear as it pressed forward. Faulty intelligence apparently led him also to believe that those persons in the village were not innocent civilians but were either enemies or enemy sympathizers. For a participant in the My Lai operation, the circumstances that could have obtained there may have caused the illegality of alleged orders to kill civilians to be much less clear than they are in a hindsight review. n8

n8 A New York Times Book Reviewer has noted, "One cannot locate the exact moment in his [Calley's] narrative when one can be absolutely certain that one would have acted differently given the same circumstances." See Paris ed., New York Herald Tribune, September 13, 1971.

Since the defense of superior orders was not submitted to the military jury under what I consider to be the proper standard, I would grant Lieutenant Calley a rehearing.

I concur in Judge Quinn's opinion on the other granted issues.

APPENDIX 5

CHARGES OF CORPORAL CHARLES A. GRANER, JR., U.S. ARMY

Charge 1: VIOLATION OF UCMJ, ARTICLE 81

THE SPECIFICATION 1: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 23 October 2003 conspired with Staff Sergeant Ivan L. Frederick, II, and Private First Class Lynndie R. England, to commit an offense under the Uniform Code of Military Justice, to wit: maltreatment of subordinates, and in order to effect the object of the conspiracy the said Corporal Graner did photograph a detainee being dragged by Private First Class Lynndie R. England with a leash wrapped around the neck of the detainees.

THE SPECIFICATION 2: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003 conspired with Staff Sergeant Javal S. Davis, Specialist Jeremy C. Sivits, Specialist Sabrina D. Harman, Specialist Megan M. Ambuhl and Private First Class Lynndie R. England, to commit an offense under the Uniform Code of Military Justice, to wit: maltreatment of subordinates, and in order to effect the object of the conspiracy the said Corporal Graner posed for a photograph with the said Specialist Harman behind a pyramid of naked detainees.

Charge II: VIOLATION OF UCMJ, ARTICLE 92

THE SPECIFICATION: in that Corporal Charles A. Graner, Jr., U.S. Army, who knew of his duties at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, from on or about 20 October 2003 to on or about 1 December 2003, was derelict in the performance of those duties in that he willfully failed to protect detainees from abuse, cruelty and maltreatment, as it was his duty to do.

Charge III: VIOLATION OF UCMJ, ARTICLE 93

THE SPECIFICATION 1: in that Corporal Charles A. Graner, Jr., U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, did maltreat several detainees, persons subject to his orders, by placing naked detainees in a human pyramid and photographing and being photographed with the pyramid of naked detainees.

THE SPECIFICATION 2: in that Corporal Charles A. Graner, Jr., U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, did maltreat several detainees, persons subject to his orders, by ordering the detainees to strip, and then ordering the detainees to masturbate in front of the other detainees and soldiers, and then placing one in a position so that the detainee’s face was directly in

front of the genitals of another detainee to simulate fellatio and photographing the detainees during the acts.

THE SPECIFICATION 3: in that Corporal Charles A. Graner, Jr., U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, did maltreat a detainee, persons subject to his orders, by being photographed with one armed cocked back as if he was going to hit the detainee in the neck or back.

THE SPECIFICATION 4: in that Corporal Charles A. Graner, Jr., U.S. Army, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 23 October 2003, did maltreat a detainee, persons subject to his orders, by encouraging Private First Class Lynndie R. England to drag a detainee by a leash wrapped around said detainees neck, photographing said misconduct.

Charge IV: VIOLATION OF UCMJ, ARTICLE 128

THE SPECIFICATION 1: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, unlawfully strike several detainees by jumping on and impacting a pile of said detainees with his shoulder or upper part of his body

THE SPECIFICATION 2: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, unlawfully stomp on the hands and bare feet of several detainees with his shod feet.

THE SPECIFICATION 3: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, commit an assault upon a detainee by striking him with a means or force likely to produce a death or grievous bodily harm, to wit: punching the detainee with a close fist in the temple of his head with enough force to cause the detainee to be knocked unconscious and require medical attention.

THE SPECIFICATION 4: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 15 November 2003, commit an assault upon a detainee by striking him with a means or force likely to produce death or grievous bodily harm, to wit: striking the detainee on previously – inflicted lesions with a asp (a metal, expandable baton), that caused pain sufficient to make the detainee cry out, “Mister, Mister, please stop.”

Charge V: VIOLATION OF UCMJ, ARTICLE 134

THE SPECIFICATION 1: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 15 October 2003, wrongfully have sexual intercourse with Private First Class Lynndie R. England, a married women not his wife.

THE SPECIFICATION 2: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, wrongfully committed an indecent act with detainees, SSG Ivan L Fredrick, Ii, Specialist Megan M. Ambuhl, and Private First Class Lynndie R. England, by observing a group of detainees masturbating, or attempting to masturbate, while they were located in a public corridor of the Baghdad Correctional Facility, with other soldiers who photographed or watched the detainees' actions.

THE SPECIFICATION 3: in that Corporal Charles A. Graner, Jr., U.S. Army, did, at or near Baghdad Central Correctional Facility, Abu Ghraib, Iraq, on or about 8 November 2003, wrongfully influenced the cooperation of a witness to a crime by stating to Specialist Jeremy C. Sivits, "You did not see shit," or words to that effect, referring to the maltreatment of subordinates by the said Corporal Graner.[312]

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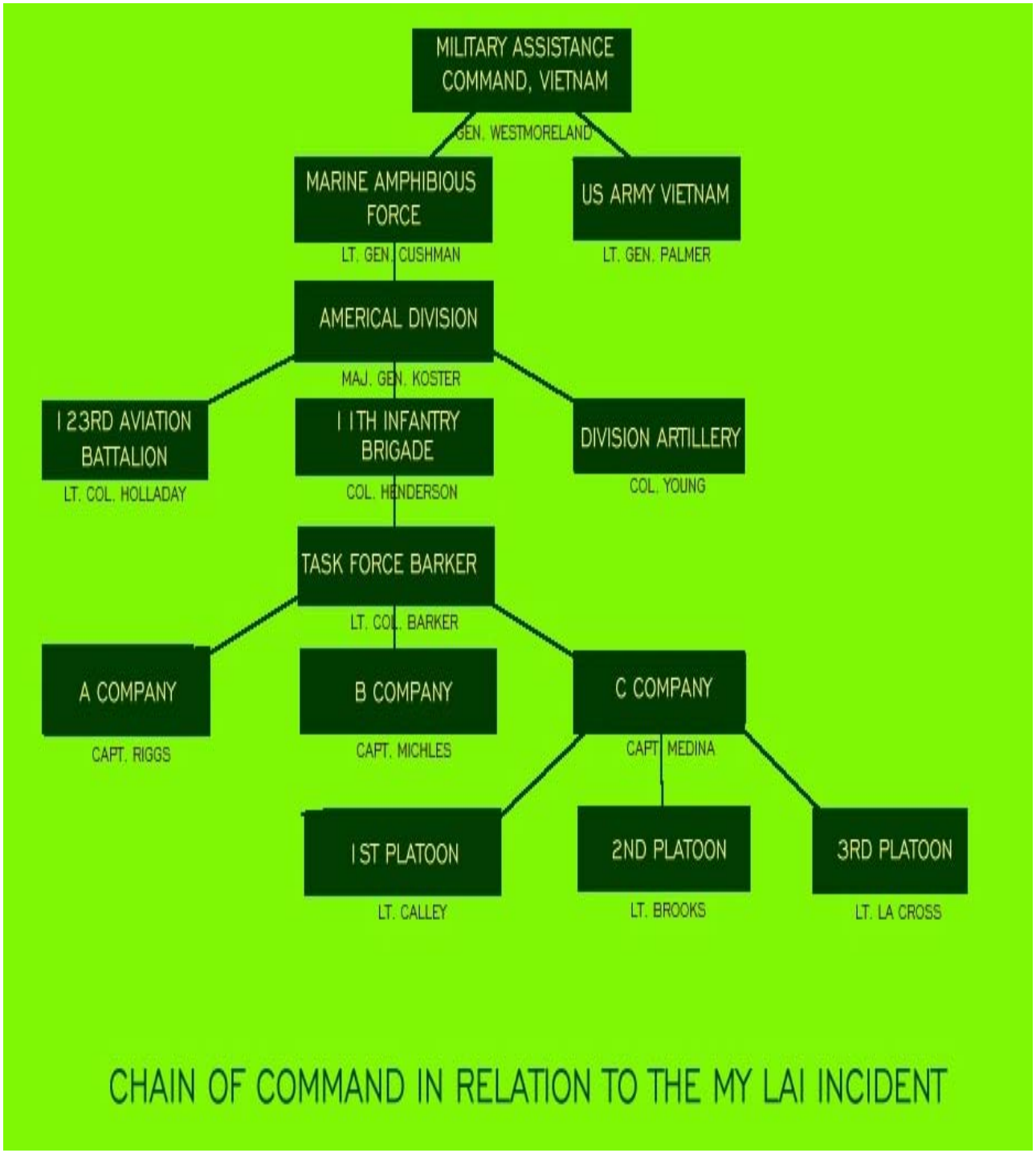
312 FindLaw, "*Preferred Charges against Corporal Charles Graner*", 14 May 2004 in http://news.findlaw.com/hdocs/iraq/graners51404chrg.html, 1 – 5.

APPENDIX 6

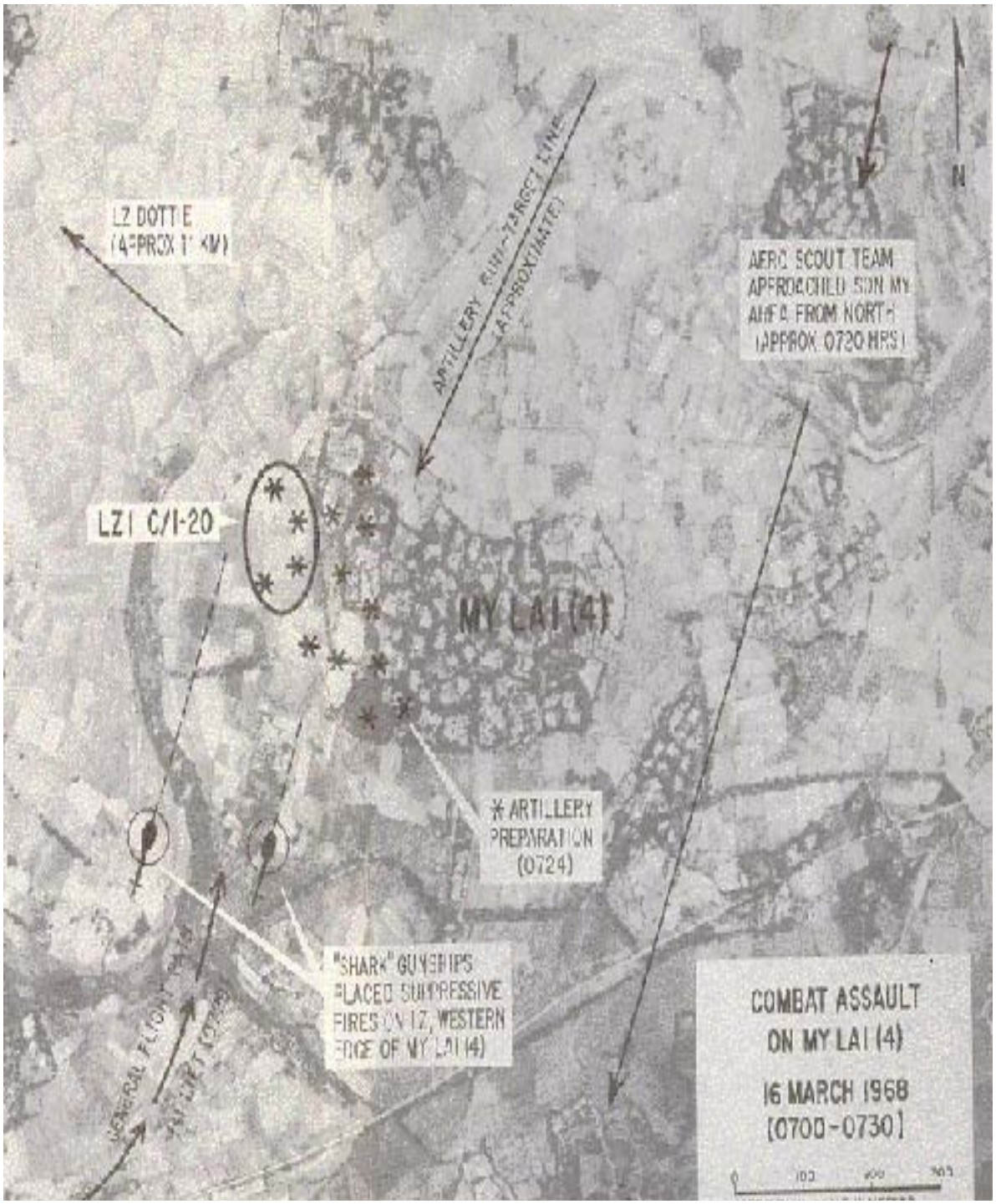
CHAIN OF COMMAND IN RELATION TO THE MY LAI INCIDENT



http://www.law.umkc.edu/faculty.projects/ftrials/my_cha.htm

APPENDIX 7

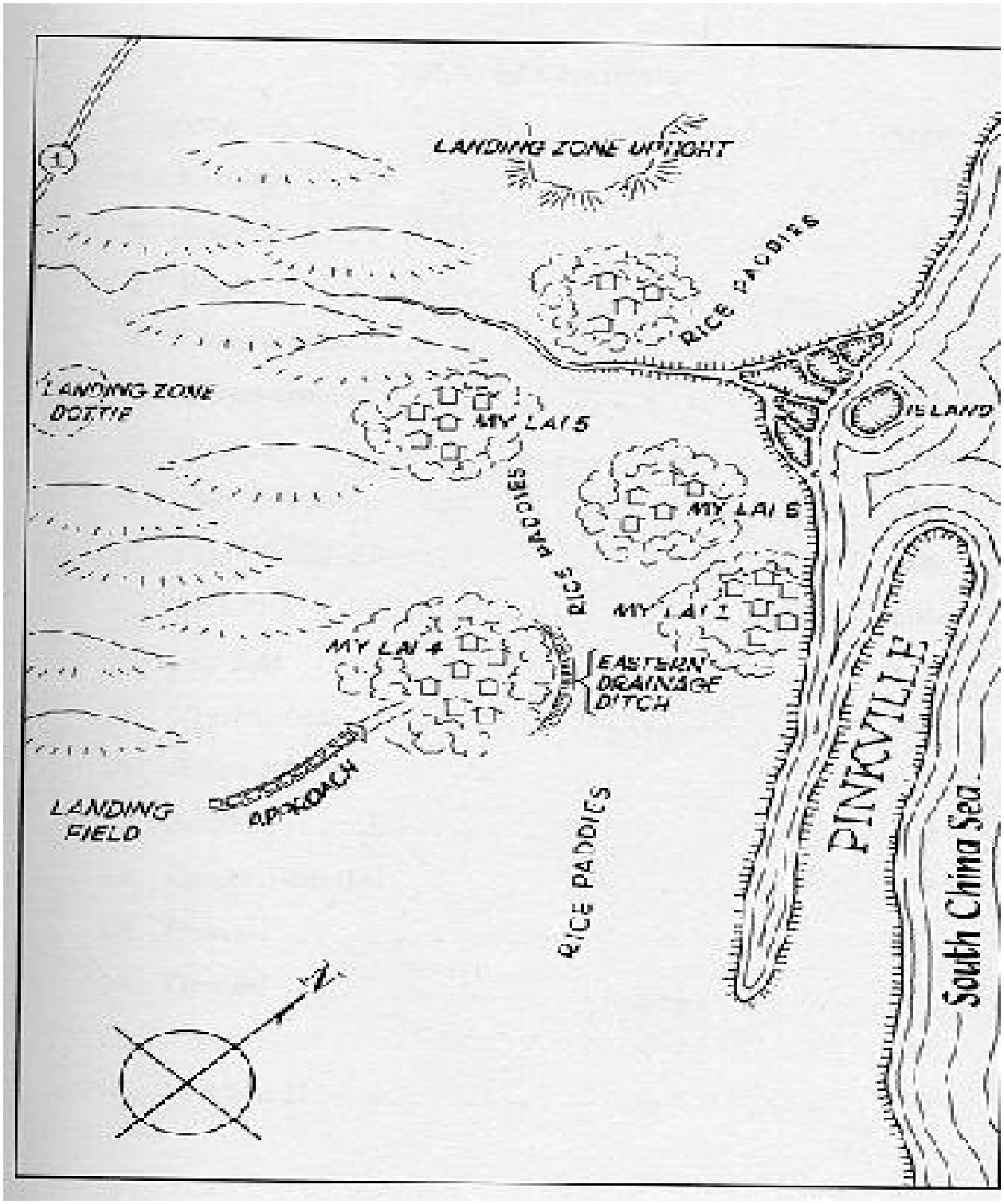
COMBAT ASSAULT ON MY LAI: ARIEL VIEW



http://www.law.umkc.edu/faculty.projects/ftrials/mylai/map1.jpg.

APPENDIX 8

SKETCH OF THE MY LAI HAMLET



http://www.law.umkc.edu/faculty.projects/ftrials/mylai/map1.jpg.

APPENDIX 9

Rules of Engagement

Example 1.

Guidelines of Rules of Engagement

1. When on the post, mobile or foot patrol, keep loaded magazine in weapon, bolt closed, weapon on safe, no round in the chamber.

2. Do not chamber a round unless told to do so by a commissioned officer unless you must act in immediate self-defense where deadly force is authorized.

3. Keep ammo for crew served weapons readily available but not loaded. Weapons on safe.

4. Call local forces to assist in self-defense effort. Notify headquarters.

5. Use only minimum degree of force to accomplish any mission.

6. Stop the use of force when it is no longer needed to accomplish the mission.

7. If you receive effective hostile fire, direct your fire at the source. If possible, use friendly snipers.

8. Respect civilian property; do not attack it unless absolutely necessary to protect friendly forces.

9. Protect innocent civilians from harm.

10. Respect and protect recognized medical agencies such as Red Cross and Red Crescent, etc.[313]

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313 D B Hall, "Rules of Engagement and Non-Lethal Weapons: A Deadly Combination?", (1997) http://www.globalsecurity.org/military/library/report/1997/Hall.htm, 1.

Example 2

Beirut White Card ROE: September 1982 - October 1983

Rules of Engagement for American and British Embassy External Security Forces

1. Loaded magazines will be in weapons at all times when on post, bolt closed, weapon on safe. No round will be in the chamber.

2. Round will be chambered only when intending to fire.

3. Weapon will be fired only under the following circumstances:

a. A hostile act has been committed.

(1) A hostile act is defined as rounds fired at the embassy, embassy personnel, embassy vehicle, or Marine sentries.

(2) The response will be proportional.

(3) The response will cease when attack ceases.

(4) There will be no pursuit by fire.

(5) A hostile act from a vehicle is when it crosses the established barricade. First fire to disable the vehicle and apprehend occupants. If the vehicle cannot be stopped, fire on the occupants.

(6) A hostile act from an individual or group of individuals is present when they cross the barricade and will not stop after warnings in Arabic and French. If they do not stop fire at them.

4. Well aimed fire will be used; weapons will not be placed on automatic.

5. Care will be taken to avoid civilian casualties.[314]

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[314] Benis M Frank., "*U.S. Marines in Lebanon 1982-1984*", (1987) History and Museums Division, Headquarter, U.S. Marine Corps, Washington DC, 24 - 64.

Example 3.

JOINT TASK FORCE FOR SOMALIA RELIEF OPERATION

GROUND FORCES RULES OF ENGAGEMENT

Nothing in these rules of engagement limits your right to take appropriate action to defend yourself and your unit.

A. You have the right to use force to defend yourself against attacks or threats of attack.

B. Hostile fire may be returned effectively and promptly to stop a hostile act.

C. When U.S. Forces are attacked by unarmed hostile elements, mobs and/or rioters, U.S. Forces should use the minimum force necessary under the circumstances and proportional to the threat.

D. You may not seize the property of others to accomplish your mission.

E. Detention of civilians is authorized for security reasons or in self-defense.

Remember

1. The United States is not at war.

2. Treat all persons with dignity and respect.

3. Use minimum force to carry out mission.

4. Always be prepared to act in self-defense.[315]

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315 UNITAF ROE CARD: SOMALIA, DEC 1992 - MAY 1993 in Hall D B, "Rules of Engagement and Non-Lethal Weapons: A Deadly Combination?", (1997) http://www.globalsecurity.org/military/library/report/1997/Hall.htm, 1

Example 4

JOINT TASK FORCE UNITED SHIELD

RULES OF ENGAGEMENT SER #1, 11 JAN 95

Nothing in these rules of engagement limits your right to take appropriate action to defend yourself and your unit

A. You have the right to use deadly force in response to a hostile act or when there is a clear indication of hostile intent.

B. Hostile fire may be returned effectively and promptly to stop a hostile act.

C. When U.S. Forces are attacked by unarmed hostile elements, mobs, and/or rioters, U. S. Forces should use the minimum force necessary under the circumstances and proportional to the threat.

D. Inside the designated security zones, once a hostile act or hostile intent is demonstrated, you have the right to use minimum force to prevent armed individuals/crew-served weapons from endangering U.S./UNOSOM II Forces. This includes deadly force.

E. Detentions of civilians is authorized for security reasons or in self-defense.

Remember

1. The United States is not at war.

2. Treat all persons with dignity and respect

3. Use minimum force to carry out mission.

4. Always be prepared to act in self-defense.[316]

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316 CJCS approved CTF ROE Card for United Shield, in Lorenz F.M., USMC, "*Rules of Engagement in Operation United Shield*," (8 August 1995) Staff Judge Advocate, I Marine Expeditionary Force, Camp Pendleton, CA, 12.

Example 5

13TH MEU (S0C) UNITED SHIELD

ROE SERIAL #1 130001Z FEB 95

Criteria for the use of Deadly Force

Identify - Friend, unknown, or not friendly? I must know it is not friendly.

Threat - To myself, my fellow Marines and Sailors, CTF or UNOSOM II forces and civilians and NGO's accompanying or intermingled with UNOSOMII personnel directly supporting US operations, or other specified facilities and property.

Hostile - In response to a hostile act or clear evidence of hostile intent to cause great bodily harm or death.

NOTHING IN THESE RULES OF ENGAGEMENT LIMITS A UNIT LEADER'S OBLIGATION TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND HIS UNIT AND U.S. FORCES

General Rules of Engagement

1. This ROE takes precedence over all other rules governing the use of deadly force.

2. I **always** have the right to defend myself, my fellow Marines and Sailors, UNOSOM personnel, and personnel directly supporting US operations.

3. I will protect US, UNOSOM, and other specified facilities and property.

4. I do not want to cause excessive collateral damage to personnel or property.

5. I will use only the force necessary to protect myself and accomplish my mission.

6. I must be able to observe point of impact for indirect fire.

7. I will not use booby traps, mines, or other unattended means of force.

8. I can detain any individual who interferes with the accomplishment of my mission.

9. I can detain any individual who commits a crime within U.S. controlled areas until I can turn them over to higher headquarters.

10. My actions need to be quick, deliberate, accurate, and never as a result of a desire for revenge.

GRADUATED RESPONSE

If conditions permit, I may employ the following responses: (though not in any order)

Verbal warnings in English or Somali

Firing a warning shot in the air

Show of force, including riot control formation

Use of pepper spray and riot control agents (as approved)

None of the above precludes my use of deadly force if required.

Remember:

1. I will remember that The United States is not at war.

2. I will treat all persons with dignity and respect.

3. I will use minimum force to carry out the mission.

4. I will not take souvenirs.

5. I will not give food or water to the Somali people.

6. I will always be prepared to act in self-defense.[317]

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317 ROE Card (front and back) issued by 13th MEU as opposed to CTF card, Lorenz F.M., USMC, "*Rules of Engagement in Operation United Shield*," (8 August 1995) Staff Judge Advocate, I Marine Expeditionary Force, Camp Pendleton, CA, 14-15.

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